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No. 4201

1390 United States 1384

Circuit Court of Appeals

For the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,
Plaintiffs in Error,

vs.

A. LEVY and J. ZENTNER COMPANY, a Corporation,
Defendant in Error,

and

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,
Plaintiffs in Error,

vs.

A. W. KNOX,
Defendant in Error,

and

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,
Plaintiffs in Error,

vs.

JOSEPH MOYSE and A. P. JACOBS, Copartners Doing Business Under the Firm Name and Style of JACOBS, MALCOLM & BURTT,
Defendants in Error.

Transcript of Record.

Upon Writs of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

HENLEY C. BOOTH, Esq., ELMER WESTLAKE, Esq., and JAMES E. LYONS, Esq., 65 Market St., San Francisco, California,
Attorneys for Plaintiffs in Error.

ALFRED J. HARWOOD, Esq., Kohl Bldg., San Francisco, California,
Attorney for Defendants in Error.

In the Southern Division of the District Court of the United States, Northern District of California, Second Division.

AT LAW.—No. 16741.

A. LEVY & J. ZENTNER COMPANY, a Corporation,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,

Defendants.

Complaint.

Now comes A. Levy & J. Zentner Company, a corporation, a resident of the city and county of San Francisco, State of California, in the Southern Division of the Northern District of California, and complains of the defendants, Northern Pacific Rail-

way Company, a corporation, and Southern Pacific Company, a corporation, and for cause of action allege:

I.

That at all times herein mentioned plaintiff was, and now is, a resident of the city and county of San Francisco in the Northern District of California. That at all times herein mentioned plaintiff was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

That the defendant Northern Pacific Railway Company is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Minnesota; that the defendant Southern Pacific Company is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky; that at all times herein mentioned each of said defendants was and now is a common carrier engaged in the transportation of passengers and property wholly by railroad from one state or territory of the United States to other states and [1*] territories thereof; that each of said defendants is, and at all times herein mentioned was, subject to the provisions of the Act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce," as amended.

III.

That said defendant Northern Pacific Railway

*Page-number appearing at foot of page of original certified Transcript of Record.

Company operates and at all times herein mentioned operated a railroad from the station of Kennewick, in the State of Washington, to the city of Portland, in the State of Oregon. That said defendant Southern Pacific Company operates and at all times herein mentioned operated a railroad from said city of Portland to San Francisco, Modesto, Stockton, San Jose, Porterville and Merced in the State of California (hereinafter called said points of delivery). That said railroad, from the said station of Kennewick to the said city of Portland, passes through the stations of Harrah, Wapato, Topenish, Sunnyside and Outlook, which said stations are hereinafter called said intermediate stations. That all of said intermediate stations are in the State of Washington.

IV.

That prior to the year 1917, said defendants established a through route and joint rate on potatoes from said station of Kennewick to said points of delivery, which said through route and joint rate so established by defendants was in effect during and at the times that all the shipments described in paragraph V of this complaint moved. That said through route from said station of Kennewick to said points of delivery passes through said intermediate stations. That said railroad and said joint route from said station of Kennewick to said points of delivery passes through said intermediate stations. That it is a less distance from said intermediate stations and each of them, to said points of delivery than it is from said station of Kenne-

wick to said points of delivery. That it is a longer distance from said station of Kennewick over the same line and route in the same direction to said points of delivery than [2] it is from said intermediate stations to said points of delivery, the shorter being included within the longer distance.

V.

That between the 26th day of October, 1921, and the 11th day of March, 1922, viz., on the dates hereinafter stated in this paragraph of this complaint, said plaintiff caused to be shipped and transported over the said line of the defendants, Northern Pacific Railway Company and Southern Pacific Company, from said intermediate stations to said points of delivery, sixty-eight carloads of potatoes; that said sixty-eight carloads of potatoes were all transported from said intermediate stations to the said points of delivery.

That upon the arrival of said shipments at said points of delivery, the defendants demanded that plaintiff pay for the transportation thereof charges in excess of the charges then made by defendants for the transportation of the same quantity and of like kind of property for a longer distance over the same line in the same direction, the shorter being included within the longer distance; that is to say, the defendants demanded that plaintiff pay for the transportation of said potatoes charges greater than said defendants then charged for the transportation of potatoes from the said station of Kennewick to the said point of delivery. That plaintiff thereupon paid said charges so demanded by defendants,

which said charges so paid by plaintiff were greater than the compensation then charged by defendants for the transportation of like kind of property for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

That the following statement shows the date of shipment of each carload, the number of the car in which it was shipped, the station from which the shipment was made, the place of destination of each shipment, the amount of the charges paid by said plaintiff for the transportation thereof, the date that said charges were paid, and the amount by which the charges so paid exceeded the charges then made for the [3] transportation of the same quantity of like kind of property for the greater distance, as aforesaid, which said last mentioned amount appears under the head "Overcharge" in the following statement: [4]

Date of Shipment	No. of Car		Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
10/29/21	IC	68852	Harrah	San Francisco	$264.95	11/ 8/21	$79.09
10/29/21	LV	35944	Harrah	San Francisco	259.22	11/ 8/21	77.38
11/14/21	Erie	61092	Harrah	San Francisco	247.63	11/25/21	73.92
11/16/21	CGW	30409	Harrah	San Francisco	248.74	12/ 5/21	74.26
11/17/21	NP	95388	Harrah	San Francisco	248.03	12/ 9/21	75.04
11/25/21	CNW	16416	Wapato	San Francisco	230.07	12/ 8/21	54.24
11/26/21	NP	97204	Wapato	San Francisco	221.94	12/12/21	52.34
11/29/21	RI	67736	Wapato	San Francisco	232.30	12/12/21	54.77
12/ 2/21	CBQ	37786	Wapato	San Francisco	221.92	12/19/21	52.32
12/ 6/21	PRR	101900	Wapato	San Francisco	229.01	12/19/21	59.41
12/ 7/21	Erie	61293	Wapato	San Francisco	226.24	12/21/21	53.34
12/ 8/21	NYC	141382	Wapato	San Francisco	229.61	12/21/21	54.14
12/10/21	SLSF	1187	Wapato	San Francisco	225.93	12/25/21	53.28
12/12/21	Penn	102094	Wapato	San Francisco	222.41	12/28/21	52.44
12/14/21	NP	95516	Wapato	San Francisco	245.37	1/ 3/22	57.86

Date of Shipment	No. of Car		Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
1/11/22	NP	95595	Wapato	San Francisco	211.95	1/25/22	49.65
1/12/22	Penn	102871	Wapato	San Francisco	212.18	1/25/22	49.70
1/13/22	NP	96895	Wapato	San Francisco	216.65	1/25/22	50.75
2/14/22	L&N	56438	Toppenish	San Francisco	200.97	3/ 3/22	47.08
2/15/22	NP	94569	Toppenish	San Francisco	210.96	2/28/22	49.42
2/16/22	NP	95212	Toppenish	San Francisco	223.36	3/ 1/22	52.32
1/10/22	NP	95148	Sunnyside	San Francisco	205.57	1/23/22	48.15
1/21/22	Penn	103126	Sunnyside	San Francisco	203.07	2/ 2/22	47.37
1/21/22	SFRD	6567	Sunnyside	San Francisco	201.74	2/ 2/22	47.25
1/21/22	SSW	50491	Sunnyside	San Francisco	227.27	2/ 2/22	53.23
1/28/22	NP	97554	Sunnyside	San Francisco	229.38	2/10/22	53.73
2/14/22	NP	95779	Sunnyside	San Francisco	207.96	2/28/22	48.71
2/15/22	IC	58142	Sunnyside	San Francisco	222.33	3/ 3/22	52.07
2/17/22	NP	96000	Sunnyside	San Francisco	230.05	3/ 6/22	53.89
2/16/22	NP	95525	Sunnyside	San Francisco	201.63	3/ 1/22	47.23

Date of Shipment		No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
2/17/22	NP	94658	Sunnyside	San Francisco	217.06	2/28/22	50.84
2/18/22	NP	95705	Sunnyside	San Francisco	218.39	3/ 6/22	51.15
2/21/22	NYC	152361	Sunnyside	San Francisco	205.41	3/10/22	48.12
2/23/22	NP	95763	Sunnyside	San Francisco	206.13	3/10/22	48.28
2/24/22	NP	98865	Sunnyside	San Francisco	199.73	3/16/22	46.73
2/24/22	NP	95811	Sunnyside	San Francisco	202.91	3/13/22	47.53
2/25/22	NP	94824	Sunnyside	San Francisco	233.32	3/23/22	54.65
2/25/22	NP	97304	Sunnyside	San Francisco	220.22	3/13/22	52.58
2/25/22	NP	96768	Sunnyside	San Francisco	202.41	3/16/22	48.43
2/28/22	NP	94451	Sunnyside	San Francisco	202.80	3/15/22	47.50
2/28/22	NP	96877	Sunnyside	San Francisco	205.13	3/15/22	48.05
3/ 1/22	NP	94649	Sunnyside	San Francisco	221.78	3/17/22	51.95
3/11/22	NP	96608	Outlook	San Francisco	216.14	3/23/22	50.62
3/10/22	NP	96508	Outlook	San Francisco	219.31	3/23/22	51.37
3/ 2/22	NP	96394	Outlook	San Francisco	217.25	3/23/22	50.48

Date of Shipment	No. of Car		Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
2/28/22	NP	98431	Outlook	San Francisco	249.89	3/15/22	58.53
2/28/22	SFRD	15233	Outlook	San Francisco	259.57	3/17/22	60.84
2/27/22	NP	94846	Outlook	San Francisco	220.22	3/15/22	51.58
2/28/22	NP	95323	Outlook	San Francisco	229.08	3/15/08	53.66
2/26/22	NP	95272	Outlook	San Francisco	258.49	3/15/22	60.55
2/25/22	NP	94977	Outlook	San Francisco	216.81	3/18/22	50.78
2/23/22	NP	94671	Outlook	San Francisco	228.02	3/10/22	53.41
2/23/22	SLSW	50349	Outlook	San Francisco	229.13	3/10/22	53.37
2/19/22	NP	98110	Outlook	San Francisco	212.43	3/ 6/22	49.76
2/15/22	SFRD	14934	Outlook	San Francisco	243.34	3/ 3/22	57.00
1/11/22	IC	54019	Outlook	San Francisco	218.86	1/25/22	51.26
1/16/22	NP	96745	Outlook	San Francisco	227.74	2/ 2/22	53.34
1/28/22	NP	95853	Outlook	San Francisco	223.67	2/10/22	52.39
[5] 1/29/22	NP	96693	Outlook	San Francisco	223.91	2/10/22	52.45

Date of Shipment		No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
1/25/22	NP	95682	Outlook	San Francisco	215.65	2/ 8/22	50.52
1/25/22	NYC	141382	Outlook	San Francisco	208.46	2/10/22	48.83
1/26/22	NP	95949	Sunnyside	Stockton	223.89	2/ 4/22	52.45
11/23/21	CBQ	38439	Wapato	Modesto	310.51	12/ 8/21	51.27
2/11/22	NP	95520	Outlook	Modesto	223.04	3/30/22	68.15
11/25/21	NP	98024	Toppenish	San Jose	233.20	12/14/21	54.99
1/14/22	NP	94605	Sunnyside	San Jose	200.74	2/ 2/22	47.02
11/15/21	NP	97201	Toppenish	Porterville	288.32	11/30/21	4.82
10/27/21	NYC	139456	Toppenish	Merced	273.16	11/13/21	47.46

That the first figure in the column headed "Date of shipment" and in the column headed "Date of Payment" shows the month of the year and the second figure the day of the month and the third figure the year of the present century; that the figures in the columns headed "Charges paid" and "overcharged" represent dollars and cents, the figures before the decimal point representing dollars and the figures after the decimal point representing cents.

VI.

That neither of said defendants ever applied to the Interstate Commerce Commission for authority to charge less from said station of Kennewick to said points of delivery than from said intermediate stations to said points of delivery. That a lower rate or compensation for the haul from said station of Kennewick to said points of delivery did not exist on the 18th day of June, 1910, the time of the passage of the Act of Congress of June 18, 1910, amendatory to said Act of Congress of February 4, 1887. That the Interstate Commerce Commission never authorized said defendants, or either of them, to charge less from Kennewick to said points of delivery than from said intermediate stations to said points of delivery.

VII.

That neither of said defendants has paid the plaintiff the amount of said overcharges, or any part thereof, or any interest thereon.

VIII.

That the matter in controversy in this suit exceeds, exclusive of interest and costs, the sum or value of $3,000, and is between citizens of different states, to wit, between the plaintiff a citizen of the State of California and the defendants who are citizens [6] of states other than California, as hereinabove alleged.

WHEREFORE plaintiff prays judgment against said defendants for the amount of said overcharges, as alleged in paragraph V, to wit, for the sum of Three Thousand Six Hundred and Seven and 06/100 Dollars (3607.06), together with interest on each overcharge at the rate of seven per cent per annum from the date of payment thereof, and for the further sum of $1000 as attorney's or counsel's fees. And the plaintiff also prays judgment for its costs of suit.

ALFRED J. HARWOOD,
Attorney for Plaintiff.

State of California,
City and County of San Francisco,
Northern District of California,—ss.

Sidney Levy, being first duly sworn, deposes and says: That he is an officer, to wit, the secretary of the plaintiff corporation above named; that he has read the within and foregoing complaint and knows the contents thereof and the same is true of his own knowledge.

SIDNEY LEVY.

Subscribed and sworn to this 17th day of June, 1922.

[Seal] E. M. CLARK,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jun. 17, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [7]

(Title of Court and Cause—No. 16741.)

Answer of Defendants Northern Pacific Railway Company and Southern Pacific Company.

Now come the defendants Northern Pacific Railway Company and Southern Pacific Company, and, for answer to the complaint herein, admit, aver and deny as follows, to wit:

I.

Aver that they have not sufficient knowledge, information or belief upon the subject to enable them to answer the allegations of paragraph I of said complaint, and, upon that ground, deny each and every, all and singular, the allegations in said paragraph contained.

II.

Deny that the railroad of the defendant Northern Pacific Railway Company from the station of Kennewick to the city of Portland passes through the station of Harrah, and deny that said station is an intermediate point on said line between Kennewick and Portland or between Kennewick

and any of the points of destination mentioned in said complaint.

III.

Deny that said or any through route from said station of Kennewick to said points of delivery, or any of them, passes through said station of Harrah, or that the same is an intermediate point upon said line or route, or that said railroad or said joint route from said station of Kennewick to said points of delivery, or any of them, passes through said station of Harrah.

IV.

Admit, subject to verification, that the plaintiff and its assignor made the shipment of potatoes between the points described in paragraph V of said complaint and paid freight charges thereon, as alleged in said paragraph.

V.

Deny that neither of defendants ever applied to the [8] Interstate Commerce Commission for authority to charge less from said station of Kennewick to said points of delivery, or any of them, than from said intermediate stations, or any of them, to said points of delivery, or any of them.

SECOND SEPARATE DEFENSE.

And for a further and separate answer and defense to said complaint, defendants aver that the station of Harrah is not situated upon the line of defendant Northern Pacific Railway Company passing between the city of Kennewick, in the State of Washington, and the city of Portland, in the State of Oregon, but said station is situated

upon a branch line of defendant Northern Pacific Railway Company, and that said station is not intermediate upon said line of railway of Northern Pacific Railway Company passing between said city of Kennewick and said city of Portland, or between said city of Kennewick and any of the points of destination mentioned in the complaint.

THIRD SEPARATE DEFENSE.

And for a further, separate and third answer and defense to said complaint, defendants aver that on or about the 11th day of February, 1911, these defendants filed with the Interstate Commerce Commission an application in writing requesting that said Commission authorize and permit said defendants to charge rates upon potatoes and other commodities between the cities of San Francisco, Oakland, San Jose, Stockton, Marysville and Los Angeles, and other points in the State of California, and the town of Pasco, in the State of Washington, lower than the rates from said California points to points on the Northern Pacific Railway Company intermediate to said town of Pasco, Washington. That the station of Kennewick is situated upon the line of defendant Northern Pacific Railway Company, in the State of Washington, intermediate to said California points herein named, and said station of Pasco. That said application has never been cancelled or withdrawn and the same has never been granted or refused or acted upon, either wholly or in part, by the Interstate Commerce Commission. [9]

FOURTH SEPARATE DEFENSE.

For a further, separate and fourth answer and defense to said complaint, defendants aver that the plaintiff did not prior to the commencement of this action, nor at all, apply to the Interstate Commerce Commission for reparation for or on account of the matters and things alleged in said complaint, nor has said commission ever made an order directing either of the defendants to pay to the plaintiff any sum whatsoever for or on account of the assessment or collection of freight charges upon any of the shipments alleged in the complaint.

FIFTH SEPARATE DEFENSE.

And for a further, separate and fifth answer and defense to said complaint, defendants aver, upon information and belief, that the plaintiff has not been damaged by the payment of any of the freight charges mentioned in the complaint.

SIXTH SEPARATE DEFENSE.

And for a further, separate and sixth defense and answer to said complaint, defendants aver that between the 26th day of October, 1921, and the 11th day of March, 1922, inclusive, no carloads of potatoes were shipped from said station of Kennewick, in the State of Washington, upon the lines of defendant Northern Pacific Railway Company, to any of the points of delivery mentioned in the complaint or over the route therein described at a lesser charge than is alleged to have been assessed upon the shipments of potatoes, alleged in the complaint to have been made from said intermediate

points, or any of them, to said points of delivery or any of them.

WHEREFORE, said defendants pray that plaintiff take nothing by its said action and that they may be dismissed hence with their costs.

HENLEY C. BOOTH,
FRANK B. AUSTIN,
Attorneys for Defendants. [10]

State of California,
City and County of San Francisco,—ss.

G. L. King, being first duly sworn, deposes and says, that he is an officer, to wit, assistant secretary of defendant Southern Pacific Company, a corporation, and, as such officer, is duly authorized to and does make this verification for and on behalf of said defendant; that he has read the foregoing answer and knows the contents thereof and the same is true of his own knowledge, except as to the matters which are therein stated on information or belief and as to those matters that he believes it to be true.

G. L. KING.

Subscribed and sworn to before me this 28th day of September, 1922.

[Seal] FRANK HARVEY,
Notary Public in and for the City and County of San Francisco, State of California.

Due service of the within answer is admitted this 28th day of September, 1922.

A. J. HARWOOD,
Attorney for Plaintiff.

[Endorsed]: Filed Sep. 28, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [11]

(Title of Court and Cause—No. 16741.)

Trial Stipulation.

It is stipulated that the allegations of paragraph I of the complaint are true and that no evidence thereof need be offered at the trial.

Dated: March 9, 1923.

ALFRED J. HARWOOD,
Attorney for Plaintiff.
HENLEY C. BOOTH,
FRANK B. AUSTIN,
Attorneys for Defendants.

So ordered.

R. S. BEAN,
Judge.

[Endorsed]: Filed Mch. 12, 1923. Walter B. Maling, Clerk. [12]

At a stated term, to wit, the March term, A. D. 1923, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the Courtroom in the city and county of San Francisco, on Wednesday, the 14th day of March, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable GEORGE M. BOURQUIN, District Judge for the District of Montana, designated to hold and holding this cause.

(Title of Cause—No. 16741.)

Minutes of Court—March 14, 1923—Order Allowing Defendant to File an Amendment to Answer.

* * * * * * * * *

Ordered that defendant may file an amendment to answer.

* * * * * * * * *

Defendants moved for a nonsuit on the grounds stated; which motion was submitted after arguments by counsel and being fully considered was denied.

* * * * * * * * *

[13]

(Title of Court and Cause—No. 16741.)

Amendment to Answer.

Now come the defendants above named, and, by leave of Court first had and obtained, file this their amendment to their answer heretofore filed herein as follows:

THIRD SEPARATE DEFENSE.

And for a further, separate and third answer and defense to said complaint, defendants aver that on or about the 11th day of February, 1911, these defendants filed with the Interstate Commerce Commission an application in writing requesting that said Commission authorize and permit said defendants to charge rates upon potatoes and other commodities between the cities of San Francisco, Oakland, San Jose, Stockton, Marysville and Los Angeles, and other points in the State of California,

and the town of Pasco, in the State of Washington, lower than the rates from said California points to points on the Northern Pacific Railway Company intermediate to said town of Pasco, Washington.

On or about the third day of February, 1914, the Interstate Commerce Commission duly gave, made and entered its order, known as Fourth Section Order No. 3700, a copy of which is hereto attached, marked Exhibit "A," and made a part hereof.

That the station of Kennewick is situated upon the line of defendant Northern Pacific Railway Company, in the State of Washington, 2.7 miles west of said station of Pasco and the same is a point on the said line adjacent and in close proximity to said station of Pasco, and is also intermediate to said California points herein named and said station of Pasco. That on or about the 17th day of May, 1911, the rates on potatoes from Pasco to said California points herein named were extended by said defendants to said station of Kennewick, and ever since that time said rates from Kennewick to said California destinations have been the same as the rates from Pasco to said destinations. [14]

That said application above referred to, which was filed with the Interstate Commerce Commission on or about the 11th day of February, 1911, has never been cancelled or withdrawn, and the same has never been granted or refused or acted upon, either wholly or in part, by the Interstate Commerce Commission; that said Fourth Section Order No. 3700 has never been vacated, modified or set aside

in whole or in part and was in full force and effect during all the times mentioned in the complaint herein and at the time of the movement of each of the shipments therein referred to, except that section 6 thereof has been eliminated.

H. C. BOOTH,
F. B. AUSTIN,
Attorneys for Defendants. [15]

State of California,
City and County of San Francisco,—ss.

G. L. King, being duly sworn, deposes and says: That he is an officer, to wit, assistant secretary of Southern Pacific Company, a corporation, one of the defendants named in the foregoing amendment to answer, and as such officer he is duly authorized to and does make this verification for and on behalf of said corporation; that he has read the foregoing amendment to answer and knows the contents thereof, and the same is true of his own knowledge, except as to the matters which are therein stated on information or belief and as to such matters he believes it to be true.

G. L. KING.

Subscribed and sworn to before me this 14th day of March, 1923.

[Seal] FRANK HARVEY,
Notary Public in and for the City and County of San Francisco, State of California. [16]

Exhibit "A."

"The Commission being of the opinion that the convenience of the carriers, the public, and the

Commission will be better served by assembling in one general fourth section order, divided into numbered sections for convenient tariff reference, the general fourth section orders known as Fourth Section Order No. 100, General No. 2; Fourth Section Order No. 485, General No. 9; Fourth Section Order No. 839, General No. 11; and Fourth Section Order No. 2200, General No. 12 and experience having suggested certain modifications in the descriptions of conditions under which relief has been afforded by these orders, and certain additional situations as to which carriers may be relieved from the operation of said section, therefore,

"It is ordered, That Fourth Section Order No. 100, General No. 2; Fourth Section Order No. 485, General No. 9; Fourth Section Order No. 839, General No. 11; and Fourth Section Order No. 2200, General No. 12, be, and the same are hereby, vacated and set aside as of March 15, 1914.

"It is further ordered, That effective March 15, 1914, as to and confined in all cases to rates and fares which are included in and covered by applications for relief from the provisions of the fourth section of the act to regulate commerce that were filed with the Commission on or before February 17, 1911, and until the applications including and covering such rates or fares have been passed on by the Commission, carriers may file with the Commission, in the manner and form prescribed by law and by the Commission's regulations, such changes in rates and fares as occur in the ordinary course of their business, continuing

higher rates or fares at intermediate points, and through rates or fares higher than the combinations of intermediate rates or fares, provided that in so doing the discrimination against intermediate points is not thereby increased. [17]

"It is further ordered, That as to and confined in all cases to rates which are included in and covered by applications as above described, carriers may file with the Commission, in the manner and form prescribed by law and by the Commission's regulations, changes in rates under the following conditions, although the discrimination against intermediate points is thereby increased:

"Section 1. A through rate which is in excess of the aggregate of the intermediate rates lawfully published and filed with the Commission may be reduced to equal the sum of the intermediate rates.

"Section 2. Where a through rate has been, or is hereafter, reduced under the authority of section 1 of this order, carriers maintaining through rates via other routes between the same points may meet the rate so made by the route initiating the reduction.

"Section 3. Where a reduction is made in the rate between two points under the authority of section 1 of this order, such reduction may extend to all points in the group which take the same rates as does the point from or to which the rate has been reduced.

"Sec. 4. Where through rates are in effect which exceed the lowest combination of rates lawfully

published and filed with the Commission, carriers may correct said through rates by reducing the same to equal such lowest combination.

"Sec. 5. A longer line or route may reduce the rates in effect between the same points or groups of points to meet the rates of a shorter line or route when the present rates via either line do not conform to the fourth section of the act, under the following circumstances:

(a) Where the longer line is meeting a reduction in rates initiated by the shorter line. [18]

(b) Where the longer line has not at any time heretofore met the rates of the shorter line.

"Sec. 6. A newly constructed line publishing rates from and to its junction points under the authority contained in paragraph (b) of section 5, may establish from and to its local stations rates in harmony with those established from and to junction points.

"Sec. 7. Carriers whose rates between certain points do not conform to the fourth section of the act, which rates have been made lower than rates at intermediate points to meet the competition of water or rail-and-water carriers between the same points, may make such further reductions in rates as may be required to continue to effectively meet the competition of rail-and-water or all-water lines.

"Sec. 8. Where rates are in effect from or to a point that are lower than the rates effective from or to intermediate points, carriers may extend the application of such rates to, or establish rates made with relation thereto at, points on the same line

adjacent or in close proximity thereto, provided that no higher rates are maintained from and to points intermediate to the former point and the new point to which the application of the same or relative rates has been extended.

"Sec. 9. Where there is a rate on a commodity from or to one or more points in an established group of points from and to which rates are ordinarily the same, but the rate on the said commodity does not apply at all points in the said group, such rate may be made applicable to or from all of such other points.

"Sec. 10. Where there is a definite and fixed relation between the rates from and to adjacent or continuous groups of points, and the rates to and from one of said groups are changed, corresponding changes may be made in the rates of the other [19] groups to preserve such relation.

"Sec. 11. In cases where no through rates are in effect via the various routes or gateways between two points, and the combination of lawfully published and filed rates via one gateway makes less than the combination via the other gateway, a through rate may be established on the basis of the combination via the gateway over which the lowest combination can be made, and made applicable via all gateways.

"Sec. 12. In cases where through rates are in effect between two points, via one or more routes or gateways, which are higher than the combination of lawfully published and filed rates via one of these gateways, different carload minima being used on

the opposite sides of the gateway, a through rate may be established equal to the lowest combination of lawfully published and filed rates, using the higher of the carload minima but continuing the present higher through rate if based upon a lower carload minimum.

"The Commission does not hereby approve any rates that may be filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the act.

"And it is further ordered, That when the Commission passes upon any application for relief from the provisions of the fourth section with respect to the rates referred to herein, the order issued with relation thereto will automatically cancel the authority herein granted as to the rates covered and affected by such order."

[Endorsed]: Filed Mch. 14, 1923. Walter B. Maling, Clerk. [20]

(Title of Court.)
KNOX vs. RY. COS.—No. 16746.
LEVY vs. RY. COS.—No. 16741.
MOYSE vs. RY. COS.—No. 16694.
MOYSE vs. DAVIS.—No. 16693.

(Decision.)

These four cases, virtually tried as one, involve primarily the long and short haul provisions of the Interstate Commerce Act.

The last thereof in whole and the first and second in part are barred by limitations of said act.

The allegations of the complaints are that in 1920–1922 certain merchandise was shipped over the lines of defendants, from points in Washington to points in California; that the former points are a shorter distance from the latter, over the same route, than Kennewick is; that the joint charges established, demanded and paid upon said shipments were greater than like charges upon like shipments from Kennewick.

The defenses are failure of plaintiffs to seek reparation from the Interstate Commerce Commission; authority from the Act and the Commission to thus charge lower rates from Pasco, 2.7 miles from Kennewick, and which lower rates were extended by defendants to Kennewick, all before the shipments herein; that certain of the shipments were from points on branch lines and not included within the distance from Kennewick to points of destination; that various California statutes of limitation bar the cause of action; and that plaintiffs have not been damaged.

From the evidence it appears and is found that when Sec. 4 of the Act was amended in 1910, the defendants' rates so far as involved herein, were not less from Kennewick than from these points of shipments and were rates lawfully existing. [21] Following the said amendment and on October 14, 1910, the Commission issued an order that carriers might file limited changes in discriminatory rates, and file applications for relief from Sec. 4 in

form in the order prescribed, all until Feb. 17, 1911; that Feb. 11, 1911, defendants filed with the Commission an application for relief from Sec. 4, and filed with it a tariff effective Jan. 15, 1911; that this tariff established a joint rate of 30 cents per hundred on shipments from Pasco to these California points of destination, and a joint rate of 39 cents per hundred on shipments from these Washington points of shipments to said points of destination, which application is yet undetermined; that on May 17, 1911, defendants filed with the Commission a tariff extending the Pasco rate to Kennewick; that on Feb. 3, 1914, the Commission issued an order that until like applications were determined the applicant carriers could further reduce the long haul rates and could extend them to points adjacent or in close proximity, any and all thereof to be filed with the Commission; that some few points of shipments are on spur lines from 2.2 miles to 9.5 miles in length, joining defendants' main line at points 67 and 87 miles from Kennewick.

The plaintiffs are entitled to recover save in so far as barred by the limitations of the Act, viz., to recover upon all items of shipments made within two years prior to complaints filed herein. They were not bound to first seek relief from the Commission, but could as they did proceed to assert their right herein.

See Davis vs. Parrington, 281 Fed. 14.

In so far as the points on spur lines are concerned, for all substantial and practical rate-making purposes they are on the "same line or route in the

same direction" as Kennewick, and a distance "shorter being included within the longer distance," within the intent and meaning of Sec. 4 of the Act. [22]

The local charge from them to the main line, added to the long haul charge, will afford compensation for any extra handling. Whether or not defendants' application to be relieved from Sec. 4 was in proper form and time, it affords no protection in respect to the violations of Sec. 4 involved in the charges herein. These violations were by reason of rates initiated subsequent to the amendment of 1910, and so not within the latter's continuance of rates "lawfully existing at the time of the passage of this Act" until applications made to continue them were by the Commission determined. They were only within that provision of Sec. 4 which provided that application for relief could be made and granted "in special cases after investigation." That is, rates to be thus granted or authorized, but which could not be legally charged until thus granted or authorized. In so far as justification for defendants' rates is sought in the Commission's order of Oct. 14, 1914, there is none for the Commission had no power to sanction greater rates for short hauls than for longer hauls, save "in special cases after investigation" as in Sec. 4 provided.

Here was none of this statutory procedure but only a blanket order, unauthorized by the statute.

See U. S. vs. Assoc., 242 U. S. 187.

The same may be said of the Commission's order of Feb. 3, 1914. It was made without authority

and is void, in so far as it purports to sanction violations of the long and short haul clause, by extension or otherwise.

That plaintiffs have been damaged and at least to the extent of the excess of the charges over the Kennewick charge, is settled by David vs. Parrington, *supra.*

However defendants violate the statute by tariffs filed and published, it will be presumed that in the lesser charge for the long haul they have at least reasonable compensation; and hence, obviously the greater charge for the short haul is unreasonable and damaging to the extent of the excess [23] at the very least.

This affords a rule valid and sound in principle, shifting to defendants the burden of evidence to rebut and lessen this *prima facie* proof of damage.

In the matter of attorney's fees, it is believed and found that the reasonable value of his service in this court is—in case No. 16746, $1100; in case No. 16741, $600; and in case No. 16694, $500; a total of $2200.00. Legal interest from payments made and costs to plaintiffs. Judgments accordingly. The parties will make the computation for purposes of the judgment.

May 30, 1923.

BOURQUIN,
Judge.

[Endorsed]: Filed June 18, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [24]

At a stated term, to wit, the March Term, A. D. 1923, of the Southern Division of the United States District Court, in and for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 18th day of June, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable MAURICE T. DOOLING, District Judge.

(Title of Cause—No. 16741.)

Minutes of Court—June 18, 1923—Order for Judgment.

In accordance with the decision of the Honorable George M. Bourquin, United States District Judge for the District of Montana (before whom this case was heretofore tried), which said decision is this day filed,

IT IS ORDERED that judgment be entered herein in favor of plaintiff and against the defendants upon special findings to be filed. [25]

(Title of Court and Cause—No. 16741.)

Findings of Fact and Conclusions of Law.

The above-entitled action came duly on for trial on the 14th day of March, 1923, the plaintiff being represented by Alfred J. Harwood, its attorney, and the defendants by Messrs. Elmer Westlake, James E. Lyons, and Frank B. Austin, their attorneys.

Said action was tried on the 14th and 15th days of March, 1923, and was thereupon submitted to the Court for its decision. After due consideration the Court makes and files this its decision, embracing its findings of fact and conclusions of law as follows:

I.

That all of the allegations of subdivisions I, II, IV, VI, VII, and VIII of the complaint herein, are true and are sustained by evidence.

II.

That all of the allegations of subdivisions III and V of the complaint, are true and are sustained by the evidence except as otherwise specifically found by finding of fact number IV, and except as otherwise specifically found in finding of fact number IV, all of the allegations of subdivisions III and V of the complaint are true and are sustained by the evidence.

III.

That the reasonable sum to be allowed plaintiffs, for and as attorney's and counsel fees herein, is the sum of Six Hundred ($600.00) Dollars, which said sum is hereby taxed as part of the costs of the case.

IV.

That the station of Harrah mentioned and described in subdivisions III and V of the complaint is not on the main line of the defendant, Northern Pacific Railway Company, [26] between Kennewick and Portland, but is on short branch or spur line which connect with said main line between

Kennewick and Portland; that said station is distant 9.5 miles from the main line; that the point from which said branch lines to said station of Harrah diverges from the said main line is more than 67 miles west of Kennewick, and is intermediate between Kennewick and Portland. That in case of shipments from said station of Harrah the plaintiff is not entitled to recover the full amount of the alleged overcharge stated in subdivision V of the complaint, but is entitled to recover the difference between said alleged overcharge and the charge then made by defendant, Northern Pacific Railway Company, for the haul from said station of Harrah to said main line; that the amount of the overcharge on shipments from said station of Harrah is as follows: In the shipment in car No. IC 68852, the amount of the overcharge was and is the sum of $54.77 instead of the sum of $79.09 as stated in the complaint. In the case of the shipment in car No. LV 35944 the amount of the overcharge was and is the sum of $52.24 instead of $77.38 as stated in the complaint. In the shipment in car No. Erie 61092 the amount of the overcharge was and is the sum of $49.90 instead of the sum of $73.92 as stated in the complaint. In the shipment in car No. CGW 30409 the amount of the overcharge was and is the sum of $50.15 instead of $74.26 as stated in the complaint. In the shipment in car No. NP 95388, the amount of the overcharge was and is the sum of $51.12 instead of the sum of $75.04 as stated in the complaint. That for all practical rate-making purposes said station of Harrah is intermediate between Kenne-

wick and Portland, and also between Kennewick and the stations of delivery.

V.

With relation to the second separate defense set up in defendants' answer, the Court finds as follows: That the station of Harrah is not on the line of the Northern Pacific Railway Company passing between Portland and Kennewick, but is on short branch line which diverges from [27] said main line, as more specifically appears in finding of fact IV: That for all practical rate-making purposes said station is intermediate between Kennewick and Portland, and between Kennewick and the points of destination mentioned in the complaint.

VI.

That on October 14, 1910, the Interstate Commerce Commission made an order in the words and figures set forth in Exhibit "A," attached to and made a part of these findings; that on December 16, 1910, the defendants filed with the Interstate Commerce Commission a so-called application for relief from the provisions of the fourth section of the Interstate Commerce Act, a copy of which said so-called application is marked Exhibit "B" and made a part of these findings; that on December 16, 1910, said defendants filed with the Interstate Commerce Commission a so-called application for relief from the provisions of the fourth section of the Interstate Commerce Act, a copy of which said so-called application is marked Exhibit "C" and made a part of these findings.

That on or about the 11th day of February, 1911,

the defendants filed with the Interstate Commerce Commission an application in writing requesting that said Commission authorize and permit said defendants to charge rates upon potatoes and other commodities between the cities of San Francisco, Oakland, San Jose, Stockton, Marysville and Los Angeles, and other points in the State of California, and the town of Pasco, in the State of Washington, lower than the rates from said California points to points on the Northern Pacific Railway Company intermediate to said town of Pasco, Washington; that a copy of said application is annexed to and made a part of these findings and marked Exhibit "D."

That on or about February 3d, 1914, the Interstate Commerce Commission made and entered an order denominated, "Fourth Section Order No. 3700"; that the copy of said order, marked Exhibit "A," and attached to the amendment to the answer [28] of the defendants, is a true copy of said order, except that before the part of the said order set forth in said Exhibit "A" the following occurs, viz.:

> "In the matter of permitting ordinary changes in rates pending action upon applications for relief from the provisions of the Fourth Section of the Act to Regulate Commerce as amended June 18, 1910."

That the station of Kennewick is situated upon the line of defendant Northern Pacific Railway Company, in the State of Washington, three miles west of said station of Pasco, and is also intermedi-

ate to said California points named in the complaint, and said station of Pasco. That on or about the 17th day of May, 1911, the rates on potatoes from Pasco to said California points herein named were extended by said defendants to said station of Kennewick, and ever since that time said rates from Kennewick to said California destinations have been the same as the rates from Pasco to said destinations; that said station of Pasco is on the east side and said station of Kennewick is on the west side of the Columbia River.

That said application above referred to, which was filed with the Interstate Commerce Commission on or about the 11th day of February, 1911, has never been cancelled or withdrawn, and the same has never been granted or refused or acted upon, either wholly or in part, by the Interstate Commerce Commission; that said Fourth Section Order No. 3700 has never been vacated, modified or set aside in whole or in part, except that Section 6 thereof has been eliminated.

VII.

That the allegations of the alleged fourth separate defense pleaded in the answer of the defendants are true and are sustained by the evidence.

VIII.

That plaintiff has been damaged by the payment of the freight charges mentioned in the complaint; that plaintiff has been damaged by the amount of the overcharges as hereinabove [29] found, plus the interest on each overcharge at the rate of seven

per cent (7%) per annum, from the date of the payment thereof to the date of judgment herein.

CONCLUSIONS OF LAW.

As conclusions of law from the foregoing findings of fact the Court finds:

I.

That plaintiff is entitled to judgment against defendants for the sum of Three Thousand Four Hundred Eighty-five Dollars and Ninety-six Cents (3485.96), being the total amount of the overcharges collected by defendants, together with interest on each separate overcharge at the rate of seven per cent per annum from the date of the payment thereof as alleged in the complaint to the date of judgment; that the total amount of said interest to the 1st day of July, 1923, is the sum of Three Hundred Thirty-nine Dollars and Eighty-four Cents ($339.84); that the interest on said overcharges amounts to the sum of Sixty-seven Cents ($.67) per day.

II.

That plaintiff is entitled to judgment for the sum of Six Hundred ($600.00) Dollars as attorney's and counsel fees herein, which said sum shall be taxed as part of the costs of the case.

III.

That plaintiff is entitled to judgment for its cost of suit.

Let judgment be entered accordingly.

Dated this 8 day of Aug., 1923.

BOURQUIN,
District Judge. [30]

Exhibit "A."

INTERSTATE COMMERCE COMMISSION.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 14th day of October, A. D. 1910. Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN K. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,
Commissioners.

In the Matter of Application for Relief Under the Fourth Section of the Act to Regulate Commerce, as Amended June 18, 1910.

A public hearing having been had, and it appearing that changes in rates and fares occurring in the ordinary course of business should be possible, pending the time when formal applications to be relieved from the requirements of section 4 of the act to regulate commerce are to be filed by the carriers subject to that act:

IT IS ORDERED: That until February 17, 1911, said carriers may file with the Commission, in manner and form as prescribed by law and by the Commission's regulations, such changes in rates and fares as would occur in the ordinary course

of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points, and through rates or fares higher than the combinations of the intermediate rates or fares, provided that in so doing the discrimination against intermediate points is not made greater than that in existence on August 17, 1910, except when a longer line or route reduces rates or fares to the more distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the short line. The Commission does not hereby approve any rates or fares that may be filed under this permission, all such rates and fares being subject to complaint, investigation, and correction if they conflict [31] with any other provisions of the act.

IT IS FURTHER ORDERED, That such of said carriers as desire to be relieved from any of the requirements of section 4 of the act shall, on or before February 17, 1911, file with the Commission applications as provided in said section 4 and in form as hereinafter prescribed.

Separate applications shall be made as to freight rates and passenger fares. Separate applications shall also be made for relief under the long-and-short-haul provision and for relief under the prohibition against through rates or fares in excess of the combination of the intermediate rates or fares.

Separate application should also be made for different situations governed by different rate adjustments or competitive influences.

Such applications must be certified, and where

the relief sought is the same for two or more carriers in the same territory as to the same traffic application may be made jointly for two or more carriers by a joint agent or attorney, where the rates are contained in a joint tariff a petition from the carrier that issues the tariff, specifying the tariff by I. C. C. number, may be made on behalf of the carriers lawfully parties to the tariff and will be held and considered to be on behalf of all carriers concurring in the tariff.

Application for relief must be made on part of that carrier which actually charges more for the shorter haul than for the longer distance. For example, through rates from C. F. A territory to southeast made in combination on the Ohio River crossings. If the roads north of the river do not charge less for a longer distance haul to the river and the roads south of the river do charge more for a shorter haul, the application should be made on behalf of the roads south of the river.

If a joint rate or fare is reasonably less than the combination of the intermediate rates or fares, the carriers accepting divisions of such joint rate or fare will not [32] ordinarily be held to thereby violate the fourth section of the act.

IT IS FURTHER ORDERED, That the Commission reaffirm its previously expressed view that a through rate or fare that is higher than the combination of the intermediate rates or fares is *prima facie* unreasonable (Rule 56 (b) Tariff Circular 17–A) and will insist upon the application of that principle at the earliest possible date in

every instance except possible extreme and very unusual cases.

IT IS FURTHER ORDERED, That applications for relief from the provisions of the fourth section of the act shall be in such of the following forms as meet the conditions as to which such relief is sought:

(a) The —— (name of carrier) ——, through —— (name of officer or agent making application) its —— (Official title) ——, petitions the Interstate Commerce Commission for authority to establish rates for the transportation of —— (name of commodity or description of traffic) —— from —— (name or description of point or points of origin) to —— (name or description of point or points of destination) —— lower than rates concurrently in effect to intermediate points —— (names or description of intermediate points) ——; the highest charge of such intermediate points to apply at —— (name of intermediate point) ——, and to be not more than —— (cents per 100 pounds, per ton, per car, or per package) —— in excess of the rates to —— (name of more distant point at which lower rate is proposed) ——. This application is based upon the desire of petitioner to meet by direct haul over a longer line or route competitive conditions created at —— (name or description of more distant point or points at which lower rates are proposed) —— by —— (name of railway) ——.

NOTE.—The points from and to which the lower rates are desired should be stated specifically [33] whenever practicable. If the ap-

plications applied to a situation in which rates or fares from or to a large number of points are based upon, or bear a fixed relation to, the rate or fare from a basing point to the destination in question, it will be sufficient to so state and to give the highest charge proposed from that basing point and the point at which highest charge will apply. If application refers to a particular commodity as to which it is desired to establish commodity rates from points of production or ports of transshipment, leaving higher class rates to apply from intermediate points, that fact should be stated and the producing points or ports should be named. When it is not practicable to name all the points of origin or destination, and they can be accurately described by well-established and familiar names of traffic territories, such descriptions may be used; for example, "From Atlantic seaboard territory as described in —— tariff. I. C. C. No. ——" or "From C. F. A. territory."

(b) Same form as (a) shall be used except that the reason which is relied upon as justifying the application shall be stated to be desire to meet by direct haul lower rates fixed at the more distant point by competition of water carriers, specifying whether the competition is created by regular line or so-called "tramp" vessels, and if the former, the name of the line or lines.

(c) Application shall be made in the same form as (a), except that the reason relied upon in support

of same shall be stated to be a desire to meet competition at the more distant point created by water carriers or shorter-line railroad, and to base the rates at intermediate points upon the rate to the more distant competitive point plus a local or charge back. The application shall also show whether the charge for the back haul is the full local or a proportional or an arbitrary rate.

(d) Application shall be made in general form the same as (a), [34] but shall request authority to charge a higher rate as the through route than the aggregate of the intermediate rates subject to the provisions of the act. Application shall state clearly the reasons in support thereof, and shall specify the extent to which it is desired to make the through rate higher than the aggregate of the intermediate rates.

The same forms, modified as may be necessary, shall be used for applications relative to passenger fares, whenever it is practicable the application, either as to freight rates or passenger fares, should cite by I. C. C. numbers the tariff or tariffs in which appear the rates, continuance of which is desired, whenever it is practicable to confine the application to definite points of origin and destination, or to one or more named commodities, that should be done, and whenever practicable the rates themselves should be stated. Each carrier may file as many applications as are necessary to properly present the several situations as to which it desires relief, and it is desirable that each particular situation be treated by itself.

A true copy:

(Signed) EDW. A. MOSELEY,
Secretary. [35]

Exhibit "B."

PACIFIC FREIGHT TARIFF BUREAU.
San Francisco, Cal., December 10, 1910.

To the Interstate Commerce Commission,
Washington, D. C.

APPLICATION FOR RELIEF FROM PROVISIONS OF FOURTH SECTION OF AMENDED COMMERCE ACT FOR ACCOUNT OF PACIFIC FREIGHT TARIFF BUREAU JOINT AND PROPORTIONAL FREIGHT TARIFF NO. 1. I. C. C. NO. 2 OF F. W. GOMPH, AGENT, WHICH IS ON FILE WITH YOUR HONORABLE COMMISSION:

In the name and on behalf of each of the carriers parties to the Tariff named above, the undersigned, acting as Agent and Attorney, or under authority of concurrences on file with the Commission from each of the said carriers, respectfully petitions the Interstate Commerce Commission for authority to continue all rates shown in above-named Tariff, from and to points named, LOWER than rates concurrently in effect to intermediate points through which traffic moves, in Canada, and in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Utah and Washington, and

points in States east thereof, including District of Columbia.

This application is based upon the desire of the interested carriers to continue the present method, basis or principle of making rates lower at the more distant points than at the intermediate points; such lower rates being necessary by reason of—Competition of various water carriers operating upon the Atlantic and Pacific Oceans; Competition of carriers operating on the Atlantic and Pacific Oceans, partly by water and partly by rail; Competition of various water carriers operating coastwise on the Pacific Ocean; and of carriers partly by water (operating coastwise on the Pacific Ocean and upon the rivers of California and Oregon) and partly by rail between Pacific Coast ports and points in the interior; Rates established via the shorter or more direct routes, and applied via the longer or more circuitous route or routes; Competition between carriers [36] or routes subject to the Act to Regulate Commerce; Competition between Markets of production and distribution.

A further petition is respectfully made asking for authority to waive that portion of the Fourth Section of the Amended Act, which provides that the through rate shall not exceed the aggregate of the intermediate rates subject to the provisions of the Act, or to permit your petitioner to publish in each of its Tariffs a clause as follows:

The aggregate of the local rates (class or commodity) to and from any intermediate point, when

less than the through rates (class or commodity) shown in this Tariff, will apply as the through rate.

OR

The charges collected for the transportation of a shipment from and to, or between, points named in this Tariff and thereby made a part of this Tariff, MUST NOT EXCEED what the charges would be by applying thereon the aggregate of lawful intermediate rates in force via the route over which the shipment moved.

LINE OF A GIVEN RAILROAD, there will be found instances where the aggregate of the intermediate rates will be less than the through rates in that Tariff. This condition is almost unavoidable because different bases are used upon different portions of the same line.

F. W. GOMPH,
Agent.

Subscribed and sworn to before me this tenth (10) day of December, 1910.

PEDRO SAIZ,
Notary Public in and for the City and County of San Francisco, State of California.
My commission expires May 26, 1914. [37]

Exhibit "C."

PACIFIC FREIGHT TARIFF BUREAU.

San Francisco, Cal., December 10, 1910.

To the Interstate Commerce Commission,
Washington, D. C.

APPLICATION FOR RELIEF FROM PROVISIONS OF FOURTH SECTION OF AMENDED COMMERCE ACT FOR ACCOUNT OF PACIFIC FREIGHT TARIFF BUREAU AND PROPORTIONAL FREIGHT TARIFF NUMBER 1-A, I. C. C. NO. 62 OF F. W. GOMPH, AGENT, WHICH IS ON FILE WITH YOUR HONORABLE COMMISSION.

In the name and on behalf of each of the carriers that are parties to the above-named tariff the undersigned as agent and attorney or under authority of concurrences on file with the Commission from each of said carriers, respectfully petitions the Interstate Commerce Commission for authority to continue all rates shown in the above-named tariffs between San Francisco, Oakland, San Jose, Stockton, Marysville, Los Angeles and other points in California named in said tariff *and* Spokane, Walla Walla, Washington, Pendleton and Baker City, Oregon, and Warden, Osborne, Mullen, Idaho, and other points in Oregon, Washington and Idaho named in said tariff lower than the rates concurrently in effect at intermediate points on the Northern Pacific Railway.

This application is based on the desire of the Northern Pacific Railway to meet by direct haul over a longer line or route, competitive conditions created at Bunn, Burke, Dorn, Gem, Hecla, Larson, Mine, Mullen, Wall and Warden, Idaho by the Oregon Washington Railway and Navigation Co. met by the Northern Pacific via Paradise and St. Regis, Montana, the longer and more circuitous route, but not applicable at Intermediate points along that line between Wauser and Larson, Idaho for the reason that short line competition does not exist at such intermediate points.

It is not practical to state in this petition the [38] rates in detail nor specify the higher charge at intermediate points nor the extent to which rates at the intermediate points exceed the rates at the more distant points named.

F. W. GOMPH,
Agent.

Subscribed and sworn to before me this 10th day of December, 1910.

P. SAIZ,
Notary Public in and for the City and County of San Francisco, State of California. [39]

Exhibit "D."

PACIFIC FREIGHT TARIFF BUREAU

San Francisco, Cal., February 11, 1911.

PETITION No. 2.

To the INTERSTATE COMMERCE COMMISSION,
Washington D. C.

APPLICATION FOR RELIEF FROM PROVISIONS OF FOURTH SECTION OF AMENDED COMMERCE ACT FOR ACCOUNT OF TARIFF NO. 1–A, I. C. C. No. 62 OF F. W. GOMPH, AGENT.

In the name and on behalf of each of the carriers parties to the Tariff above-named, the undersigned, acting as Agent and Attorney, or under authority of concurrences on file with the Commission from each of the said carriers, respectfully petitions the Interstate Commerce Commission for authority to continue all rates in above-named Tariff, between San Francisco, Oakland, San Jose, Stockton, Marysville, Los Angeles, Cal., and other points in California named in said Tariff, *and* Pasco, Wash., lower than the rates to points on the Northern Pacific Railway, intermediate to Pasco, Wash.

This application is based upon the desire of the Northern Pacific Railway to meet by direct haul over a longer line or route competitive conditions created at points directly competitive with Pasco, Wash., such as Wallula and Hunts Junction, Wash.,

by the Oregon-Washington Railroad and Navigation Co.

It is not practicable in this petition to state the rates in detail nor to specify the highest charge at intermediate points, nor the extent to which rates at the intermediate points exceed the rates at the more distant points named above.

F. W. GOMPH,
Agent.

Subscribed and sworn to before me this 11th day of February, 1911.

P. SAIZ,
Notary Public in and for the City and County of San Francisco, California.

Service and receipt of a copy of the within findings of fact is hereby admitted this 30th day of June, 1923.

ELMER WESTLAKE,
J. E. LYONS,
Attorneys for Defendants.

[Endorsed]: Filed August 14, 1923. Walter B. Maling, Clerk. [40]

(Title of Court and Cause—No. 16741.)

Judgment on Findings.

This cause having come on regularly for trial upon the 14th day of March, 1923, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed; A. J. Harwood, Esq., appearing as attorney for plaintiff

and Frank B. Austin and Elmer Westlake, Esqs., appearing as attorneys for defendants and the trial having been proceeded with on the 15th day of March, 1923, and oral and documentary evidence having been introduced on behalf of the respective parties and the cause having been submitted to the Court for consideration and decision; and the Court, after due deliberation having filed its opinion and its findings in writing and ordered that judgment be entered herein in accordance with said findings:

Now therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that A. Levy & J. Zentner Company, a corporation, plaintiff, do have and recover of and from Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, defendants, the sum of Three Thousand Eight Hundred Fifty-five and 95/100 ($3,855.95) Dollars, together with $600.00 as attorney's fees and for costs herein expended taxed at $——.

Judgment entered August 14, 1923.

WALTER B. MALING,
Clerk. [41]

(Title of Court and Cause—No. 16,741, No. 16,746, No. 16,694.)

Stipulation and Order for Preparation of Single Bill of Exceptions.

It is hereby stipulated that a single bill of exceptions may be prepared and signed covering the record in the above-entitled [42] actions in lieu

of separate bills of exceptions covering each case, and that said single bill of exceptions so prepared shall serve and be used as the bill of exceptions in each case.

Dated, San Francisco, September 5th, 1923.

ALFRED J. HARWOOD,
Attorney for Plaintiffs in Each of Said Cases.

H. C. BOOTH,
ELMER WESTLAKE,
JAMES E. LYONS,
Attorneys for Defendants in Each of Said Cases.

So ordered.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Sept. 8, 1923. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [43]

(Title of Court and Cause—No. 16741.)

Stipulation and Order Extending Time to and Including September 27, 1923, to File Bill of Exceptions.

It is hereby stipulated that the defendants have until and including September 27th, 1923, in which to prepare and serve on the plaintiffs a draft of the proposed bill of exceptions in the above-entitled action.

A. J. HARWOOD,
Attorney for Plaintiffs.
HENLEY C. BOOTH,
ELMER WESTLAKE,
JAS. E. LYONS,
Attorneys for Defendants.

So ordered.

PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Sept. 18, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [44]

(Title of Court and Cause—No. 16741.)

Stipulation and Order Extending Time to and Including October 15, 1923, to File Bill of Exceptions.

It is hereby stipulated that the defendants have until and including October 15th, 1923, in which to prepare and serve on the plaintiff a draft of the proposed bill of exceptions in the above-entitled action.

ALFRED J. HARWOOD,
Attorney for Plaintiff.
HENLEY C. BOOTH,
ELMER WESTLAKE,
JAMES E. LYONS,
Attorneys for Defendants.

So ordered.

PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Sep. 27, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [45]

(Title of Court and Cause—No. 16741.)

Stipulation and Order Extending Time to and Including October 25, 1923, to File Bill of Exceptions.

It is hereby stipulated that the defendants have until and including October 25, 1923, in which to prepare and serve on the plaintiff a draft of the proposed bill of exceptions in the above-entitled action.

A. J. HARWOOD,
Attorney for Plaintiff.
H. C. BOOTH,
ELMER WESTLAKE,
JAS. E. LYONS,
Attorneys for Defendants.

So ordered.

PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Oct. 11, 1923. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [46]

(Title of Court and Cause—No. 16741.)

Stipulation and Order Extending Time to and Including November 10, 1923, to File Bill of Exceptions.

It is hereby stipulated that the defendants have until and including November 10, 1923, in which to prepare and serve on the plaintiff a draft of the

proposed bill of exceptions in the above-entitled action.

A. J. HARWOOD,
Attorney for Plaintiff.
HENLEY C. BOOTH,
ELMER WESTLAKE,
JAS. E. LYONS,
Attorneys for Defendants.

So ordered.

PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Oct, 24, 1923. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [47]

(Title of Court and Cause—No. 16741, No. 16746, No. 16694.)

Bill of Exceptions.

BE IT REMEMBERED that on March 14th and 15th, 1923, the above-entitled causes came on for hearing before Hon. George [48] M. Bourquin, Judge of said court, a jury having been duly waived by both parties. The plaintiffs appeared by Alfred J. Harwood, Esq., their counsel, and the defendants appeared by Messrs. Frank B. Austin and Elmer Westlake, their counsel, whereupon the following proceedings, and none others, were had:

By stipulation of all the parties in open court, the cases were consolidated for trial and disposition.

Mr. HARWOOD.—May it please the Court, these cases are practically all the same, that is to say, they are all for the recovery of overcharges for violations of the long and short haul clause of the Interstate Commerce Act. For instance, taking the first case, 16,693, which will first be tried, it is alleged in the complaint that the Northern Pacific Railway Company and Southern Pacific Company established a through route and joint rate on potatoes, from Kennewick to points in California, and in this through route and joint rate they all participated. The shipments of potatoes in this case moved from points west of Kennewick to points in California, and the rate charged on these potatoes was a higher rate that the rate from Kennewick to these points in California, thereby being a violation of the terms of the long and short haul clause of the the Interstate Commerce Act. Practically all of the allegations of the complaint are admitted by the answer, but I will offer in evidence a stipulation which has been signed and which was filed on the 12th of March in this case, reading as follows:

> "It is stipulated that all of the allegations of paragraphs I and X of the complaint herein are true, and that no evidence need be offered at the trial. This stipulation implies no admission as to the validity of the assignment referred to in Paragraph I." [49]

May it please your Honor, there is an assignment alleged from the corporation of Jacobs, Malcolm and Burtt to the copartnership of Jacobs, Malcolm

and Burtt, and this being a suit against the United States, it is contended that this assignment was invalid, and therefore as to the claims assigned the plaintiff could not recover.

"It is further stipulated that the allegations of the complaint denied by the following part of the answer are true, and that no evidence thereof need be offered at the trial. The part of said answer referred to is as follows:

" 'Defendant avers that he has not sufficient knowledge, information or belief upon the subject to enable him to answer the allegations of paragraph VII of the complaint with respect to the shipments consigned to, or charges paid by, either the corporation or the partnership known as Jacobs, Malcolm & Burtt, and, upon that ground, defendant denies that all, or any, of said shipments which were made during the year 1918, prior to the 15th day of November of said year, were made by Jacobs, Malcolm & Burtt, a corporation, or that the charges paid upon said shipments, or any of them, to defendant, were paid by said Jacobs, Malcolm & Burtt, a corporation; and denies that all, or any, of said shipments made in the year 1918 subsequent to November 15 of said year, or in the year 1919, were made by said copartnership of Jacobs, Malcolm & Burtt, or that the charges paid upon said shipments, or any of them, to the defendant, were paid by said copartnership."

I offer this in evidence as Plaintiff's Exhibit 1.

The COURT.—They withdraw that denial and admit the allegations of the complaint?

Mr. HARWOOD.—They withdraw the denials of this paragraph.

There is another allegation of the complaint which is denied. These shipments were made from various cities on the line [50] of the Northern Pacific, and one of the stations is the station of Moxee, on their line between Kennewick and points of destination, but off the main line, in other words, a branch point. It is the plaintiff's contention that for all practical rate-making purposes this station is the same as if it were on the line, and in support of the allegations of the complaint plaintiff would ask a stipulation that the station at Moxee is on a branch line of the Northern Pacific, nine miles from the main line.

Mr. WESTLAKE.—From what source did you get the distance?

Mr. HARWOOD.—I got the distance by calling up the Northern Pacific, and they looked up the official distance from the station and gave it to us.

Mr. WESTLAKE.—If you will add to that it is not intermediate between Kennewick and these points in California, we are willing to agree to it.

Mr. HARWOOD.—I think the question whether it is intermediate or not is a question of law. I am willing to make this stipulation, that the distance is 9 miles from the main line, that is, the distance from Moxee to the main line is nine miles, and if that is incorrect, and you find it so at any time before the case is closed, it may be changed accordingly.

Mr. WESTLAKE.—That is all right.

Mr. HARWOOD.—In paragraph III of the complaint there is an allegation reading as follows:

> "That at all times herein mentioned, each of said defendants was and now is a common carrier engaged in the transportation of passengers and property wholly by railroad from one State or Territory of the United States to other States and Territories thereof."

That allegation is denied on the presumption or based upon the fact that during this time the Government had taken over the [51] operation of the railroads.

Mr. WESTLAKE.—That is correct. And at that time the Government was engaged exclusively in the operation of these railroads.

Mr. HARWOOD.—But, nevertheless, the defendants both at that time were common carriers, although they were not engaged in carrying over this particular road.

Mr. AUSTIN.—They were in existence as corporations, but their railroads were not being operated by them.

The COURT.—Is this suit against the railroads?

Mr. HARWOOD.—No, your Honor. The suit is against James C. Davis, the agent appointed by the President.

Testimony of A. J. Harwood, for Plaintiffs.

A. J. HARWOOD was called as a witness for the plaintiffs, and, being first duly sworn, testified as follows:

The WITNESS.—I am an attorney practicing

(Testimony of A. J. Harwood.)

in the State courts of California, and also in the United States courts. In my opinion the reasonable value of the services of the plaintiff's attorney in this case (No. 16693) is the sum of $450.00. The amount sued for is $1861.00 and interest. (Tr. 5 and 6.)

Cross-examination.

(By Mr. AUSTIN.)

Q. Mr. Harwood, how much time have you spent on this particular case; what have you done?

A. Preparation of the complaint, examination of law, examination of the various separate defenses set up in the answer, and the preparation for the trial. It would be difficult to say just how much time I have spent on this particular case, because there are three other cases which involve more or less the same questions, [52] and those cases were worked on by me at the same time.

WITNESS.—(Continuing.) The same questions are not entirely involved in all of the cases. They are in many respects, however, similar. I believe in different cases there are different and separate defenses set up. In this particular case all of the separate defenses set up in the other cases are included, whereas in some of the other cases some of the separate defenses set up in this case are not included, so that there was no work involved in this case which was not involved in the other cases (Tr. 6). In all of these cases I am requesting fees based upon practically 25 per cent of the amount sued for. In case 16694 I am asking for $700.00;

(Testimony of A. J. Harwood.)

in case 16741, $1,000.00; and in case 16746, $2,000.00. In all of these cases together many days' time were spent in preparation of the pleadings, and in the preparation for the trial of these cases,—somewhere between 15 and 20 days in the four cases (Tr. 7). I spent several days in examination of questions of law. (Tr. 8.) I have been preparing for the trial for the last four or five days. The case involves no preparation of facts, the facts being virtually admitted by the pleadings, except in so far as preparation of the stipulations was concerned (Tr. 8). There is one other matter I wish to testify to before leaving the stand. Prior to December 22, 1918, the firm of Jacobs, Malcolm & Burtt was a corporation, and on that date it was dissolved by a decree of the Superior Court of the City and County of San Francisco, and all of the assets of the corporation were on that date distributed to the stockholders of the corporation, who are the members of the firm of the copartnership of Jacobs, Malcolm & Burtt, the plaintiffs in this case. (Tr. 8.)

Taking up case No. 16,694, which is the case of Joseph Moyse and A. P. Jacobs, copartners doing business under the firm name and style of Jacobs, Malcolm & Burtt vs. Northern [53] Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, I offer in evidence a stipulation entered into in this case reading as follows:

> "Trial Stipulation. It is stipulated that all of the allegations of paragraphs I and IX of

the complaint are true, and that no evidence thereof need be offered at the trial.

"It is further stipulated that the allegations of the complaint denied by the following part of the answer are true, and that no evidence thereof need be offered at the trial. The part of said answer referred to is as follows: 'Defendants aver that they have not sufficient knowledge, information or belief upon the subject to enable them to answer the allegations of paragraph V of the complaint with respect to the shipments consigned to, or charges paid by, either the corporation or the partnership known as Jacobs, Malcolm & Burtt, and, upon that ground, deny that all, or any, of said shipments which were made during the year 1917, were made by Jacobs, Malcolm & Burtt, a corporation, or that the charges paid upon said shipments, or any of them, to defendants, or either of them, were paid by said Jacobs, Malcolm & Burtt, a corporation, and deny that all, or any, of said shipments made in the years 1920, 1921 or 1922, or during any part thereof, were made by said copartnership of Jacobs, Malcolm & Burtt, or that the charges paid upon said shipments, or any of them, to the defendants, or either of them, were paid by said copartnership. Dated March 9, 1923,"

and signed by the parties and approved by the court.

I will ask that that be marked Plaintiffs' Exhibit 1.

Gentlemen, in this case there are several stations which are not directly on the main line, they are the stations of Yethanot, Moxee, Farron, Harrah, Ashue, and Cowiche, that is, those stations from which some of these shipments were made are not directly on the main line, and I would ask a stipulation of [54] counsel subject to their right to correct these figures if they are not correct before the trial closes, that Yethanot is 2.2 miles from the main line; that Farron is 8.1 miles; that Harrah is 9.5 miles; that Ashue is 5.2 miles, and that Cowiche is 9.2 miles; and that Midvale, one station I did not mention, is three miles from the main line. (Tr. 9 and 10.)

Mr. HARWOOD.—It will be stipulated that these points are on branch lines of the Northern Pacific, all making into the main line this side of Kennewick. That would include Moxee.

Mr. AUSTIN.—That will all be stipulated. (Tr. 11.)

Mr. HARWOOD.—I am asking $700.00 in Case 16,694. (Tr. 11.)

(It was stipulated that the testimony given by Mr. Harwood in case 16,693 may stand in case 16,694, and in the other two cases.) (Tr. 11.)

Mr. HARWOOD.—That is all of the evidence in 16,694, and pursuant to the stipulation made at the termination of No. 16,693, I will put the evidence in in the next case, No. 16,741, entitled A.

Levy and J. Zentner Company, a corporation, Plaintiff, vs. Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation; and in that case I offer in evidence a trial stipulation, dated March 9, between the counsel in this case, reading as follows:

> "It is stipulated that the allegations of paragraph I of the complaint are true, and that no evidence thereof need be offered at the trial."

We ask that that be marked Plaintiff's Exhibit 1 in this case.

The station of Harrah, which is not directly on the main line, is involved in this case, and will it be stipulated, subject to correction, that Harrah is 9½ miles from the main line? [55]

Mr. AUSTIN.—You got that from the same source?

Mr. HARWOOD.—Yes. It will stand on the stipulation that it is on a branch line, 9½ miles from the main line, and that the junction point is this side of Kennewick.

Mr. AUSTIN.—You mean west?

Mr. HARWOOD.—West of Kennewick, or toward California.

Mr. AUSTIN.—That stipulation is made, subject to correction.

Mr. HARWOOD.—It is understood that my testimony regarding attorney's fees in this case was $1,000: Is that correct?

Mr. AUSTIN.—Yes, and that your testimony given in 16,693 will be the same as in this case.

Mr. HARWOOD.—And that the fee mentioned was $1,000.00?

Mr. AUSTIN.—Yes.

Mr. HARWOOD.—That is all of plaintiff's proof in this case. (Tr. 11 and 12.)

Mr. HARWOOD.—The next case is 16,746, A. W. Knox vs. Northern Pacific Ry. Co., a corporation, and Southern Pacific Company, a corporation. In this case several shippers, three or four shippers, were involved, and Mr. Knox is their assignee. I offer in evidence in this case a stipulation dated March 9, reading as follows:

> "It is stipulated that the allegations of paragraphs VII and IX of the first cause of action stated in the complaint are true, and that no evidence thereof need be offered at the trial.
>
> "It is stipulated that the allegations of paragraph VII of the second, third and fourth causes of action stated in the complaint are true, and that no evidence thereof need be offered at the trial."

We ask that that be marked Plaintiff's Exhibit 1.

In this case, certain stations, Midvale, Ashue, Harrah, and Cowiche are on branch lines. Will it be stipulated that [56] Midvale is three miles from the main line, Oshue is 5.2 miles from the main line, that Harrah is 9.5 miles from the main line, and that Cowiche is 9.2 miles from the main line, this stipulation to be subject to your right

to correct it at any time before the close of the trial?

Mr. AUSTIN.—Yes. It will also be stipulated that they are on branch lines?

Mr. HARWOOD.—It is also stipulated they are on branch lines; and will it be stipulated that the junction point where they join the main line is west of Kennewick?

Mr. AUSTIN.—Yes.

Mr. HARWOOD.—It is understood, is it, that my testimony regarding the attorney's fee in this case was that a reasonable fee was $2,000.00.

Mr. AUSTIN.—That will be also understood. Also that the testimony given in No. 16,693 will be considered in this case. (Tr. 12 and 13.)

Mr. HARWOOD.—In connection with the first case (16,693), if your Honor please, I would like permission to file an amendment to the complaint, alleging the dissolution of the copartnership of Jacobs, Malcolm, & Burtt on the 22d of December, 1918, and that upon that dissolution all of the assets of the copartnership were distributed to the copartners, who were the same persons as stockholders in Jacobs, Malcolm & Burtt, a corporation. I want to make this allegation to overcome the objection that there was an assignment here contrary to Federal law preventing assignments in causes of action against the United States Government. I would like permission to file this amendment sometime this afternoon. (Tr. 14.)

Mr. AUSTIN.—We, also, in turn, would like to

submit an amendment in this case. The amendment involves the third separate defense set forth in each of the answers (Tr. 14).

The COURT.—I will allow the amendment to be made, [57] and if counsel desire a continuance they can have it. (Tr. 19.)

(The amendments to each of the answers in all of said cases were served and filed March 14, 1923, and constitute a part of the judgment-roll in each of said cases.)

Mr. AUSTIN.—Do I understand that the plaintiff rests in all of these cases?

Mr. HARWOOD.—Yes. (Tr. 20.)

Mr. AUSTIN.—If your Honor please, at this time we wish to make a motion for a nonsuit, and we base that upon several grounds. There is this ground which exists in all of the cases, namely, that the plaintiff in all of these cases has failed to prove the allegation of his complaint that the Interstate Commerce Commission never authorized the defendant carriers, or the president in case No. 16,693, to charge less from Kennewick to San Francisco than from intermediate stations to San Francisco. That allegation is repeated in the complaints; in some of them they specifically mention San Francisco and in others they mention other points of destination, but in substance it is the same. We have denied that allegation in each of our answers, and we submit that the plaintiff has failed to make a case because of failure to prove that allegation.

The Fourth Section of the Interstate Commerce Commission Act prohibits the charging of more from an intermediate point than from the more distant point, and then contains a proviso reading as follows:

> "Provided further that no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor, in any case where application shall have been filed before the Commission in accordance with the [58] provisions of this section until a determination of such application by the Commission."

They have failed to prove, although they allege the fact, and we deny it, that the Interstate Commerce Commission has not relieved the carrier from the provisions of the fourth section violation, which apparently existed in this case, and we submit that having alleged that in the complaint, the burden rests upon them to prove it.

There are other points which we make in these cases.

In the first case, Moyse vs. Davis, No. 16,693, we make the point that this court has no jurisdiction of the cause of action, that jurisdiction is vested exclusively in the Interstate Commerce Commission; that by the provisions of Section 206 of the Transportation Act, the Interstate Commerce Commission has been vested with the exclusive jurisdiction

to pass upon claims of this nature, and this Court has no jurisdiction to pass upon such claims until after the Interstate Commerce Commission has first heard them.

In that case, it is alleged and admitted by the trial stipulation that the corporation, Jacobs, Malcolm & Burtt assigned to the partnership which succeeded it the claim for damages covering these alleged overcharges which were paid by the corporation through the period of its existence. In that trial stipulation we reserved any objection as to the validity of the assignment.

Now, in this case we contend that the assignment is void under the provisions of Section 3477 of the Revised Statutes, which is Section 6383 of the United States Compiled Statutes of 1916, which prohibits assignments of claims against the United States, except when executed in the form prescribed by that statute. I have that section here. It reads:

> "All transfers and assignments made of any claim upon the [59] United States, or of any part or share thereof, or interest therein, whether or absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such claim, the ascertainment of the amount due,

> and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

It is not shown that the assignment in this case was executed in conformity with that provision, and this being a claim against the United States, we contend that it is covered by that section.

It was held in the case of Missouri Pacific vs. Ault, 256 U. S. 554, that claims against the Director General are, in effect, claims against the United States, and under that theory we believe that assignments of this character fall directly within the provisions of the statute to which we have referred.

We also urge in our application for a nonsuit that the plaintiff in each of these cases has failed to show that there was any movement or shipment of potatoes from the more distant point, that is, Kennewick, to any of the points of destination during the time that any of the shipments involved in this case moved, and, therefore, he has failed to prove any damages. [60]

We also make the point that the complaint merely

alleges a violation of the long and short haul clause, that the rates paid at the more distant point were a less amount, and he has not alleged or proved any damage; he has not shown wherein he has been injured. This is another ground in support of our contention for a nonsuit. (Tr. 20 to 23.)

We have also, in these cases, pleaded the statute of limitations, Section 338 and Section 339 of the California Code of Civil Procedure. We include the defense we have raised in our answer as to the statute of limitations in our motion for a nonsuit. (Tr. 26.)

The COURT.—In view of the fact that this case is tried by the Court, and will apparently ultimately turn upon law points, not a great volume of evidence, the Court has come to the conclusion that at least tentatively it will overrule the motion for a nonsuit. If, however, there is any point advanced in the motion by counsel for the defendant which he is entitled to the benefit of and is in conformity with the proof, of course he will get a like benefit in the final decision. (Tr. 36.)

The COURT.—As to the question of statute of limitations, I am not clear whether or not the first case may not be barred, but I hold it in abeyance for the final decision, so the motion for a nonsuit will be denied, an exception will be noted, and the defense may proceed with their case in all four cases. (Tr. 37 and 38.)

EXCEPTION No. 1.

TESTIMONY FOR DEFENDANTS.

Testimony of F. W. Gomph, for Defendant.

F. W. GOMPH was thereupon called as a witness for defendant in all four cases above referred to, and, being first duly sworn, testified as follows: [61]

The WITNESS.—I live at San Francisco. I am agent for the Pacific Freight Tariff Bureau, by which I mean that under authority of powers of attorney executed by various railroads, I act as their pulishing agent in the matter of issuing and filing freight tariffs and classifications with the Interstate Commerce Commission and the State Railroad Commissions. I have been such agent since 1909. That was continuous up to the time the railroads went under federal control, and during the period of federal control I acted as the agent of the United States Railroad Administration. On the termination of federal control, the Pacific Freight Tariff Bureau was reorganized by the carriers (Tr. 38).

Q. (By Mr. WESTLAKE.) Included among the carriers for whom you were such representative were the Southern Pacific and the Northern Pacific included?

A. The Southern Pacific was a power of attorney line. The Northern Pacific was a line which concurred in the tariffs issued by me as the agent of the Southern Pacific, being under that company's power of attorney.

(Testimony of F. W. Gomph.)

Q. What do you mean by a power of attorney line?

A. In the organization of the Pacific Freight Tariff Bureau certain railroads associated themselves, and in order to give effect to the tariffs which these associated lines may issue, the Interstate Commerce Commission provided what is known as a power of attorney which they must execute to me as agent, the original of which is filed with the Interstate Commerce Commission. (Tr. 38 and 39.)

WITNESS.—(Continuing.) I hold such power of attorney from Southern Pacific Company, beginning as early as January, 1910, down to date. During the times mentioned in these complaints and as far back as January 1, 1911, the Northern Pacific was a concurring line. (Tr. 39.) I have made an [62] examination of the tariffs to determine whether or not the carriers involved in this proceeding had fourth section relief with respect to intermediate points west of Kennewick, as compared with the rates from Kennewick. (Tr. 39 and 40.)

In 1910, the Interstate Commerce Act really placed upon the Interstate Commerce Commission the burden of carrying out the provisions of the act with respect to rates then in effect, and which might thereafter be established, which were greater for a shorter haul than for a longer haul, the shorter being included within the longer. (Tr. 41.) By an order dated October 14, 1910, entitled "In the matter of application for relief under the Fourth

(Testimony of F. W. Gomph.)

Section of the Act to Regulate Commerce, as amended June 18, 1910," the Interstate Commerce Commission states:

"A public hearing having been had and it appearing that a change in rates and fares occurring in the ordinary course of business should be possible pending the time when formal applications to be relieved from the requirements of Section 4 of the Act to Regulate Commerce are to be filed by the carriers subject to that act:

> "It is ordered that until February 17, 1911, said carriers may file with the Commission, in manner and form prescribed by law and by the Commission's regulations, such changes in rates and fares as would occur in the ordinary course of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points, and through rates or fares higher than the combinations of the intermediate rates or fares, provided that in so doing, the discrimination against intermediate points is not made greater than that in existence on August 17, 1910, except when a longer line or route reduces rates or fares to the more distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the short line. The Commission does not hereby [63] approve any rates or fares that may be filed under this permission, all such rates and fares being subject to complaint, investi-

(Testimony of F. W. Gomph.)

gation, and correction if they conflict with any other provisions of the Act."

Now this order then goes on to prescribe the form in which the carriers shall make their applications for relief from the fourth section. (Tr. 42 and 43.)

(The order to which the witness referred was thereupon received in evidence as Defendant's Exhibit "A" — Tr. 45 — and is set forth in full in "Appendix A" to this bill of exceptions.)

WITNESS.—(Continuing.) Following the terms of that order, I was instructed by the railroads for which I acted to file with the Interstate Commerce Commission a fourth section application covering the rates in the various tariffs that I published which did not conform with the provisions of the fourth section. One of these applications covered the tariff which names the rate between the points in California, on the one hand, and Pasco, Washington, on the other. The Northern Pacific Railroad extending westward from Pasco, over the Cascade Mountains through Tacoma and back into Portland was party to that tariff. The Oregon-Washington Railroad & Navigation Company extending from a point in the vicinity of Pasco to Portland, Oregon, along the Columbia River, was the other party to that tariff, and was the short line. The rates in the tariff as between the points in California, on the one hand, and Pasco, Washington, on the other, did

(Testimony of F. W. Gomph.)

not apply at points on the Northern Pacific Railroad between Pasco and Portland (Tr. 43 and 44).

Therefore there were rates from points on the Northern Pacific west of Pasco to points in California which were higher than the rates from Pasco proper, constituting a departure from the fourth section of the Act; to protect the carriers in [64] that departure under the order of the Commission dated October 14, 1910, I filed on behalf of the Southern Pacific and the Northern Pacific Railroad petition No. 2 dated February 11, 1911, entitled Application for relief from provisions of fourth section of amended commerce act for account of Tariff No. 1–A, I. C. C. No. 62 of F. W. Gomph, Agent. (Tr. 44 and 45.)

Mr. WESTLAKE.—Q. I now show you, Mr. Gomph, what purports to be a copy of Petition No. 2, to which you referred, duly certified by the Interstate Commerce Commission, and ask you whether that is the petition to which you referred?

A. Yes. (Tr. 45.)

(Petition No. 2, to which the witness referred, was received in evidence as Exhibit "B," a copy of which is fully set forth in "Appendix B" to this bill of exceptions—Tr. 48.)

WITNESS. — (Continuing.) Petition No. 2, dated February 11, 1911, which was offered this morning as Exhibit "B" was what might be termed a petition in detail and was filed subsequent to what has been termed by the carriers and the Interstate Commerce Commission an omnibus application. (Tr. 48.)

(Testimony of F. W. Gomph.)

I now offer for the account of Pacific Freight Tariff Bureau joint and proportional freight tariff No. 1, I. C. C. No. 2, a Fourth Section application to the Interstate Commerce Commission, dated December 10, 1910. (Tr. 49.)

(The document above referred to was received in evidence as Defendant's Exhibit "C,"—Tr. 49—and is attached to this bill of exceptions as "Appendix C.")

WITNESS.—(Continuing.) I now offer Pacific Freight Tariff Bureau Tariff No. 1, I. C. C. No. 2, to which that omnibus application refers (Tr. 50).

(The tariff referred to was received in evidence as Defendant's Exhibit "D" and is attached to this bill of exceptions as "Appendix D.") [65]

WITNESS.—(Continuing.) I now offer Fourth Section application to the Interstate Commerce Commission for account of Pacific Freight Tariff Bureau, Joint and Proportional Freight Tariff No. 1–A, I. C. C. No. 62, filed December 10, 1910. I offer that together with the tariff.

Mr. WESTLAKE.—I offer these two documents in evidence as Defendant's Exhibits "E" and "F," respectively, the tariff referred to being I. C. C. No. 62, Pacific Freight Tariff Bureau, Joint Proportional Freight Tariff No. 1–A. (Tr. 51.)

(The two documents referred to were received in evidence as Defendant's Exhibits "E" and "F," respectively, and are attached to this bill of exceptions as "Appendices E and F," respectively.)

WITNESS.—(Continuing.) In February, 1911,

(Testimony of F. W. Gomph.)

the Oregon-Washington Railroad & Navigation Company built its line or extended its line from Wallula westward through Kennewick to North Yakima. That line, with respect to Portland, Oregon, is the short line. The Northern Pacific Railroad paralleled the Oregon-Washington Railroad & Navigation Company from Kennewick to North Yakima, and is the long line with respect to Portland, Oregon. In supplement No. 2, to Pacific Freight Tariff Bureau, Tariff No. 1–A, I. C. C. No. 62, rates were published from Kennewick, Washington, on the Oregon-Washington Railroad & Navigation Co. applicable by that line from Portland, Oregon, to California points, and *vice versa.* (Tr. 52.)

(The document referred to, known as Supplement No. 2 to I. C. C. Tariff No. 62, effective May 17, 1911, and consisting of two leaves or four pages, was received in evidence as Defendant's Exhibit "G" and is attached to this bill of exceptions as "Appendix G.") [66]

WITNESS.—(Continuing.) In this supplement, rates were published from Kennewick, the point on the Northern Pacific Railroad applicable via Portland, Oregon, over this long line to meet the short line rates from Kennewick via the Oregon-Washington Railroad & Navigation Company, under authority of a Fourth Section order issued by the Interstate Commerce Commission (Tr. 53). The authority is contained in the Interstate Commerce Commission's Fourth Section order dated October

(Testimony of F. W. Gomph.)

14, 1910, received in evidence as Defendant's Exhibit "A" (Tr. 53). The Fourth Section application filed as Defendant's Exhibits "B," "C," and "E," are pending with the Interstate Commerce Commission, a hearing has not been held and a decision has not been rendered.

Mr. WESTLAKE.—I now offer as Defendant's Exhibit "H" Fourth Section Order No. 3700. (Tr. 54.)

(Said Fourth Section Order No. 3700 was thereupon received in evidence as Defendant's Exhibit "H" and is reproduced as "Appendix H" to this bill of exceptions.)

Mr. WESTLAKE.—I now offer in evidence, if your Honor please, Supplement No. 1 to Fourth Section Order No. 3700, and ask that it be marked Defendants' Exhibit "I."

(Said document was thereupon received in evidence as Defendants' Exhibit "I" and is reproduced as "Appendix I" to this bill of exceptions.)

Mr. HARWOOD.—Without waiving the objection, or any objection made in the case to any of the so-called applications or the order of the Commission, or the tariffs offered in evidence, the plaintiff admits that Mr. Gomph had due authority from the Northern Pacific Railway Company and the Southern Pacific Company to make any applications, or any so-called applications made by him. (Tr. 57.) [67]

Testimony of M. A. Cummings, for Defendants.

M. A. CUMMINGS was thereupon called as a witness for the defendants in all of the four cases above referred to, and, being first duly sworn, testified as follows:

My name is M. A. Cummings. I reside at Oakland, California. (Tr. 57.) I am Assistant General Freight Agent, Southern Pacific Company, San Francisco, California. I have held that position for five years, but I have been in the service of the Freight Traffic department of the Southern Pacific Company for twenty-three years. In a general way, briefly, my traffic experience has consisted of making rates, negotiating divisions, and all forms of freight traffic work in all of its aspects, as contemplated by the major freight traffic department.

Q. (By Mr. AUSTIN.) Have you before you the tariff which was in effect or the tariffs which were in effect at the time the application was made to the Commission for relief at Pasco, as shown in Exhibit "B"?

A. I have photographic copies of the relevant parts of these tariffs. (Tr. 58.)

The COURT.—The Court will allow them to be introduced subject to objection. (Tr. 60.)

(In view of counsel's objection to photographic copies of the tariffs being received in evidence, the original tariffs were offered and received in evi-

(Testimony of M. A. Cummings.)

dence and the subsequent testimony will refer to such original tariffs.)

Mr. AUSTIN.—Will you do this, will you examine these tariffs and suggest such other pages as you want?

Mr. HARWOOD.—Yes. I won't examine them at this time. I want to take my time about it. [68]

Mr. AUSTIN.—With that understanding, Mr. Cummings, will you identify that tariff and state what that is?

A. It is Pacific Freight Tariff Bureau Joint and Proportional Freight Tariff No. A, I. C. C. No. 62, including Supplement 2 thereof.

Mr. WESTLAKE.—Hasn't that been introduced in evidence already, Mr. Harwood?

Mr. HARWOOD.—Yes.

Mr. AUSTIN.—Q. Will you refer to the pages of Tariff 1–A which cover the rates from Kennewick and Pasco, and also from the intermediate points to California destinations involved in these cases? I call your attention to pages 8 and 27, 46 and 47.

Mr. HARWOOD.—This is I. C. C. 62, is it, Mr. Austin?

Mr. AUSTIN.—Yes.

A. On page 8 the relevant portion is that noted as Group 9, Northern Pacific Railway, naming Pasco, Washington, Hauser, and Larson, Idaho, and points between, including branch line points, except points on Clearwater Short Line Branch shown in Group 11. (Tr. 61.)

(Testimony of M. A. Cummings.)

WITNESS.—(Continuing.) The effect of that provision is to establish the application of Group 9 rates from Pasco, Washington. Group 9 includes points in Washington and Idaho. That is shown on page 8. (Tr. 62.) Under that tariff the most westerly point from which Group 9 rates applied as to the Northern Pacific was Pasco (62 and 63). The next page of the tariff, page 27, concerns the application of rates; Item 28 thereof provides that southbound proportional rates to intermediate points not named, south of Marysville or Woodland, California, will be the same as shown on pages 47, 48, 49 and pages 58 to 61, inclusive, to the next more distant point to which rates are named (Tr. 63).

Q. Now, will you turn to pages 46 and 47, and comment on those.

A. Page 46, captioned, "Basis for making through rates (except where through rates are provided), between San Francisco [69] and Marysville, and points between, and points on the lines of the Northern Pacific Railway shown in Groups 9 and 11." The rates will be made by adding to the proportional rates shown in Items Nos. 200 to 426, inclusive, pages 47 to 61, inclusive, the rates applying to or from Portland or East Portland, Oregon, published in the tariffs (Supplements thereto and reissues thereof) referred to below.

As to the Northern Pacific Railway local and joint freight tariff No. 1323–A is referred to below.

(Testimony of M. A. Cummings.)

On the opposite page, or page 47, appears item No. 200, which is a statement of the proportional class rates applying between Portland, Oregon, or East Portland, Oregon, to San Francisco and Marysville and points between, which are the rates referred to in the item appearing on page 46. (Tr. 63.)

Referring to the table on page 47, Class C would cover the rates on potatoes. That is the third from the last column on that page. The rate was 16 cenas at that time. (Tr. 64.)

Q. Will you turn now to Northern Pacific No. 1323 A?

Mr. AUSTIN.—I now offer this tariff as Defendants' Exhibit "J," that is Northern Pacific Railway Tariff, I. C. C. No. 4383.

(The tariff referred to was thereupon received in evidence as Defendants' Exhibit "J" and is reproduced as "Appendix J" to this bill of exceptions.)

Mr. AUSTIN.—Q. Will you turn to page 6 of that tariff and explain what items on that page have reference to this application for relief.

A. The first item or top item in which Portland, Oregon, is named as a station in Group 1.

WITNESS.—(Continuing.) On page 13 the rates from Kennewick and Pasco and other points of origin, on potatoes or onions, are named to Group 1 points, which includes Portland, as indicated [70] on page 6 of the tariff. Page 14, similar to page 13, names rates from additional points of

(Testimony of M. A. Cummings.)

origin on the Northern Pacific to Portland and Group 1 points. (Tr. 64.)

Page 21, under the caption, "Routing instructions," in ascertaining the rates from Kennewick and Pasco to Portland, for example, it will be observed that opposite the rates named from those stations in an appropriate column appear routes 2, 12 and 16, route 2 via the Northern Pacific Ry. Co., on westbound traffic, which would be traffic from Kennewick to Portland. (Tr. 65.)

Mr. AUSTIN.—I now offer in evidence Southern Pacific Company's Local and Joint Freight Tariff No. 302, I. C. C. 3270. (Tr. 65.)

(Said tariff was thereupon received in evidence as Defendant's Exhibit "K" and is reproduced as "Appendix K" to this bill of exceptions.)

WITNESS.—(Continuing.) Referring to the three tariffs which have been received in evidence: They show that from Pasco to Portland the rate is 14 cents, and is found on page 13 of Northern Pacific Railway Tariff No. 1323–A, I. C. C. No. 4383. It will be observed on referring to that page, under Group 1, the rate is specifically named from Kennewick, but not from Pasco. (Tr. 66.)

Rule No. 1, page 10, intermediate application Northern Pacific Railway points, interstate: On traffic routed via the Northern Pacific Railway direct, the rates as stated herein will apply at intermediate points not having specific rates, except as provided in Rule No. 4, unless a lower rate to or from the same point is arrived at by the use of

(Testimony of M. A. Cummings.)

the distance tariff shown in Rule No. 6, in which event a lower rate so arrived at will apply. [71]

Mr. AUSTIN.—Q. Now, will you show the factor beyond Portland?

A. Beyond Portland the factor is found in Item 200, Pacific Bureau, Joint Proportional Freight Tariff No. 1–A, I. C. C. 62.

Q. What page?

A. Page 47, which shows a rate of 16 cents from Portland and East Portland to San Francisco and certain other designated points in California, on potatoes in carloads when originating at points on the Oregon Railroad & Navigation Company and Northern Pacific Railway in Oregon, Washington, Idaho, in Group 9, as to Northern Pacific Railway traffic.

Q. What rate would that be between San Francisco and Portland? A. 16 cents.

Q. What would be the full combination rate?

A. 30 cents. (Tr. 67.)

Mr. AUSTIN.—Now, will you take the tariff and point out the different items showing the rates from the intermediate points, so-called, in this case, to California points of destination?

Mr. HARWOOD.—What tariff is this witness now referring to?

A. Northern Pacific Railway Company tariff 1323–A, I. C. C. 4383. We will take one point of origin for these shipments, say Toppenish.

Mr. AUSTIN.—What page is that on?

A. Page 13 of the tariff.

(Testimony of M. A. Cummings.)

Q. Is Toppenish in the state of Washington?

A. Yes; to Portland, Oregon, item index No. 334, page 13 of the tariff, a rate of 14 cents, Toppenish to Portland.

Q. Now, explain the rate beyond Portland.

A. The rate beyond Portland, I am now reading from Local and Joint Tariff No. 302, I. C. C. No. 3270. Exhibit "K."

Q. That is a Southern Pacific tariff?

A. Yes, on page 23, naming a rate between San Francisco and Portland on potatoes [72] and onions in straight or mixed carloads, of 25 cents.

Q. Now, the combination of the two rates would be what? A. 39.

Q. And the difference is? A. 9. (Tr. 68.)

Mr. AUSTIN.—Is it stipulated, Mr. Harwood, that these tariffs which have been introduced were filed with the Interstate Commerce Commission and in force from the effective date?

Mr. HARWOOD.—I will stipulate that these tariffs, I. C. C. 3270 and I. C. C. 4383 were on file with the Interstate Commerce Commission on or before June 10—the first one, I. C. C. No. 43, was filed with the Interstate Commerce Commission on or before June 10, 1910, and this other one, No. 3270, was filed with the Interstate Commerce Commission on or before August 27, 1910.

Mr. AUSTIN.—That covers only two of the tariffs. Does your stipulation cover I. C. C. 62?

Mr. HARWOOD.—Subject to all of the objections that have been made, it will be stipulated that

(Testimony of M. A. Cummings.)

tariff I. C. C. 62, which has been introduced in evidence, was on file with the Interstate Commerce Commission on and after January 15, 1911. (Tr. 68–69.)

WITNESS.—(Continuing.) Toppenish, as an intermediate point, is representative of the situation from all of the other intermediate points on the main line and mentioned in the complaint. (Tr. 69.)

Q. (By Mr. AUSTIN.) I will ask you to state how the rates are made from these branch line points?

Mr. HARWOOD.—I suppose it will be stipulated, in order to save time, that the rates on the branch line points which are involved here are made by the addition of the local rates from the branch line point to the junction point, plus the rate from the junction or main line point.

Mr. AUSTIN.—Q. Is that the fact?

A. There were through local rates from these branch line points to Portland, Oregon, [73] just as there were through rates from the main line points to Portland, Oregon.

Q. Are these rates shown on the tariffs which are introduced in evidence?

A. In Northern Pacific Railway Tariff 1323–A, I. C. C. No. 4383.

Q. They all appear in those tariffs?

A. Yes. (Tr. 69–70.)

WITNESS.—(Continuing.) On June 21, 1918, the rates in question here were increased 25 per

(Testimony of M. A. Cummings.)

cent, in pursuance of General Order No. 28, issued by the Director-General of the United States Railroad Administration. A further increase of 25 per cent was made effective August 26, 1920, in pursuance of the opinion of the Commission in *Ex Parte* 74, and a 10 per cent decrease was made effective January 1, 1922, in pursuance of an opinion of the Commission in reduced rates on agricultural products. (Tr. 71.)

Mr. AUSTIN.—*Ex Parte* 74 is reported in 58 I. C. C., page 220. (Tr. 71 and 72.) [74]

TESTIMONY OF PLAINTIFF IN REBUTTAL.

Testimony of A. W. Knox, for Plaintiff (In Rebuttal).

A. W. KNOX was called as a witness for the plaintiff in rebuttal, and, having been first duly sworn, testified as follows:

I have been in the railroad business 25 years. I have been agent on the rail lines and interpreted tariffs, and also read tariffs in order to know how to arrive at proper rates. At the present time I am traffic agent for various shippers. I expert their freight bills to see that proper freight rates are applied. I have been in that business for eight years. (Tr. 72).

Mr. HARWOOD.—This question I am going to ask the witness probably was a question on my direct case, it is something I omitted to put in evidence, and that is, some of these shipments, as has been stated to the Court, were made from branch line

(Testimony of A. W. Knox.)

points, which are points on branch lines a few miles from the main line in the Yakima Valley, and certain overcharges are claimed on these shipments. For instance, in case 16,693, the only branch line point involved is Moxee, and there is, I think, one shipment from Moxee. On page 6, line 18 of the complaint, the shipment of February 8, 1918, is a shipment from Moxee to San Francisco; in fact, all these shipments in the complaint are to San Francisco. The charge paid on this shipment was $207.63, and the overcharge claimed is $66.72. I want to use this as an illustration of all other branch line points, as I think it typical of the rest.

Q. How was this overcharge of $66.72 computed, Mr. Knox?

A. I used my max. rates from Kennewick to Portland, plus the rate from Portland to San Francisco. It was held as a max. at Moxee.

Q. Moxee being intermediate?

A. Being intermediate. (72, 73.) [75]

Cross-examination.

(By Mr. AUSTIN.)

WITNESS.—(Continuing.) I used your tariff, Northern Pacific tariff No. 1323, which I believe names a rate of 14 cents from Kennewick to Portland, plus the Class C rate form Portland to San Francisco of 16 cents. I applied that rate as intermediate at Moxee. (Tr. 73.)

Mr. WESTLAKE.—As I understand it, Moxee is on a branch line off the main line, the junction point being North Yakima.

(Testimony of A. W. Knox.)

Mr. HARWOOD.—That is correct.

WITNESS.—(Continuing.) I held the Kennewick rate as the maximum at Moxee because the latter point was included within the shorter distance, therefore, it was a maximum rate. (Tr. 75.)

Q. (By Mr. WESTLAKE.) How far out on the branch line would you go, Mr. Knox, before you came to a point that was not intermediate?

A. To equal or more distant points.

Q. In other words, you would go out on the branch line, for instance, as far from North Yakima as the distance from North Yakima to Kennewick?

A. To have the shorter distance within a longer, yes.

Q. In other words, you would go out on the branch line far enough so that your mileage on the branch line plus the mileage from the junction point to destination equaled the mileage from the point of origin to the point of destination?

A. To comply strictly with the Fourth Section.

Q. In other words, going to Portland, for instance, Spokane is, say, 200 miles from Pendleton, the junction point on the line going out from Spokane; Huntington is 200 miles east of Pendleton. Now, would you say that a rate from Huntington to Portland would have to be held as the maximum at Spokane?

A. The Fourth Section says on the same line and in the same direction. [76]

Q. But Spokane is on the same line, isn't it?

(Testimony of A. W. Knox.)

A. No, Huntington is down near your Idaho line.

Q. Spokane is on the same railroad as Huntington?

A. It is in a different direction. How could we go down there to identify the rate? You are talking about branch line points now.

Q. Take Moxee, for instance: Is that in the same direction?

A. It is in the same general direction, nine miles on a branch line; it is in the same direction. (Tr. 76.)

Mr. WESTLAKE.—Q. Why didn't you take the local rate from Moxee, for instance, as typical, to the junction point, and add to that the rate from Kennewick to Portland?

A. I did not think it was necessary, inasmuch as it was intermediate.

Q. And you pursued that same line of reasoning in arriving at the alleged overcharge with respect to all branch line points in issue in all of these law cases?

A. Where the difference was small and I considered it immaterial.

Q. I say, as to all of these branch line points, you pursued that method?

A. All of the branch line points that are involved in these cases.

Q. In these four cases?

A. In these four cases. (Tr. 77.)

Mr. HARWOOD.—In this connection, if your Honor please, I was under the impression when I

drew these complaints, that in arriving at the alleged overcharge at these so-called branch line points that the local from the branch line point had been added to the rate from the branch point to the junction point, and I am inclined to think now, after Mr. Westlake's suggestion, that that is the correct way to compute it. I was under the impression when Mr. Knox was on the stand, when he figured these overcharges, that this had been done in these cases, and therefore would ask permission in every instance of each of these four [77] cases to change the amount of the alleged overcharge, make it less, so as to include the local from the branch line to the junction point.

Mr. AUSTIN.—I assume that you will be willing to reduce your attorneys' fees to 25 per cent of the new amount?

Mr. WESTLAKE.—Is that correct?

Mr. HARWOOD.—Certainly. (Tr. 77 and 78.)

Mr. HARWOOD.—I have asked, without any amendment, to put that in evidence after we compute it, just what the overcharge would be. We are computing it from Kennewick to San Francisco, but we are not taking into consideration the movement from the junction point to the branch line point. I want to compute it now as the rate from the junction point plus whatever the local rate was from the junction point, whatever it may be, reducing the amount of the alleged overcharge in these cases by the amount of the charge for the local

(Testimony of A. W. Knox.)

movement from the junction point to the branch line point. (Tr. 78, 79.)

TESTIMONY FOR THE PLAINTIFFS.

Testimony of A. W. Knox, for Plaintiffs (Recalled).

A. W. KNOX was thereupon recalled for plaintiffs, and testified as follows:

WITNESS.—The local rate from Kennewick to the junction point, North Yakima, was 5 cents a hundred at the time these shipments moved. (79.)

Mr. WESTLAKE.—Some of them moved before the increase, and some of them moved after the increase, and some moved after the reduction. Would 5 cents be the maximum?

Mr. HARWOOD.—I don't know what is in the tariff.

Mr. WESTLAKE.—What is the date of that tariff?

A. November 25, 1919. No, that would not be. If that tariff names 5 cents, that is the proportional rate. We will [78] say 5½ cents would cover it; that would be the maximum Class C rate from 15 to 20 miles.

Q. Is there any minimum?

A. 5 miles or less is 4 cents, according to this tariff, 4 cents a hundred.

The COURT.—When was the rate made?

A. It was November 25, 1919.

Q. Was that before or after the increase?

A. That was after the first increase. (Tr. 79, 80.)

(Testimony of A. W. Knox.)

WITNESS.—(Continuing.) The Kennewick rate on January 12, 1918, was 30 cents per hundred pounds to San Francisco. The rate charged on that date from Sunnyside to San Francisco was 39 cents per 100 pounds. The rate charged on that date from North Yakima to San Francisco would be 39 cents a hundred. The rate from Wesley Junction to San Francisco would be the same. (Tr. 80.) The rate from Cowiche Junction to San Francisco would be 39 cents. The rate charged from Sunnyside to San Francisco was 39 cents. (Tr. 80, 81.)

(It was stipulated between counsel for the respective parties that Yethnot, Farron, Harrah and Ashue are on the Simcoe Branch and the junction point is Wesley Junction, also that Moxee is on a branch line starting from North Yakima, that is, North Yakima is the junction point. With reference to Cowiche, the junction point is Cowiche Junction. That Cowiche Junction is itself on a branch line and the junction point is North Yakima; that Midvale is on the O. W. R. & N. R. R. and not on the Northern Pacific (Tr. 81). That Kennewick is on the west side of the Columbia River, and that Pasco is on the east side of the Columbia River and that they are 2.7 or 3 miles apart and on the same line (Tr. 81, 82). It was also stipulated that the distance from Kennewick to North Yakima is 87 miles, and that the distance from Kennewick to Yakima is the same, and that the distance from Kennewick to [79] Wesley Junction is 67 miles. (Tr. 86.) Also that before June 25, 1918, the tariff

rate from Kennewick to the California points of destination, mentioned in the complaint, was 30 cents. (Tr. 87.)

Mr. AUSTIN.—The increases under *Ex Parte* Order 74 went into effect August 25, 1920. The first increase was under General Order 28, which went into effect June 25, 1918.

Mr. HARWOOD.—That will be stipulated to.

The COURT.—What was the June 25, 1918, order.

Mr. AUSTIN.—That is the date when the increases under General Order 28 went into effect.

Mr. HARWOOD.—A general increase of 25 per cent. When was the second increase.

Mr. AUSTIN.—August 26, 1920, under *Ex Parte* Order 74, another 25 per cent.

Mr. HARWOOD.—And on what date did the decrease of 10 per cent go into effect on potatoes?

Mr. AUSTIN.—On these commodities, that decrease became effective January 1, 1922.

The COURT.—And that decrease was 10 per cent.

Mr. AUSTIN.—That decrease was 10 per cent. (Tr. 86, 87.)

Mr. AUSTIN.—Will you add to that, Mr. Harwood, that the same rate obtained from Pasco to those California points?

Mr. HARWOOD.—Subject to the objection that it is immaterial, irrelevant and incompetent, that admission will be made. Will it be stipulated that after the order of June 25, 1918, and between that

date and August 25, 1920, the rate from Kennewick to points of destination was 37½ cents.

Mr. AUSTIN.—That shows for itself. I presume that is correct. I expected a gentleman here from the traffic department who can confirm that. I will stipulate to it subject to my right to correct it if I find it is incorrect.

Mr. HARWOOD.—Will it be further stipulated that after August 25, 1920, and prior to January 1, 1922, the rate from Kennewick to points of destination on potatoes was 46 cents?

Mr. AUSTIN.—Subject to the same right to change that, to correct it, I will make that stipulation.

The COURT.—When did the railroads go back to the owners?

Mr. AUSTIN.—They were returned on March 1, 1920. Federal control extended from January 1, 1918. (Tr. 87, 88.)

(It was also stipulated that on and after January 1, 1922, the rate from Kennewick to California points of destination, mentioned in the complaint, on potatoes was 42 cents (Tr. 88). It was also stipulated that the Commission's decision in *Ex Parte* 74 reported in 58 I. C. C. at pages 220 to 260 could be referred to by the various parties for the purpose of ascertaining the contents of that order (Tr. 88, 89.)

There was thereupon received in evidence General Order No. 28 as Defendants's Exhibit "L," which was reproduced as "Appendix L" to this bill of exceptions. [80]

Mr. AUSTIN.—I offer in evidence this map showing the lines of the Northern Pacific in the State of Washington, from Kennewick and Pasco to Portland, and also showing the line of the Oregon-Washington R. R. & Navigation Company between Pasco and Portland.

Mr. HARWOOD.—As its lines now exist?

Mr. AUSTIN.—Yes.

(Document was here introduced in evidence, marked Defendants' Exhibit "M," copy of which is annexed hereto as "Appendix M.")

Mr. HARWOOD.—Will it be stipulated that the map was introduced by the plaintiffs may be withdrawn?

Mr. AUSTIN.—I have no objection. Will you stipulate that the mileage shown on the statement between the points mentioned here, which is shown in this statement, and that also the distance from Kennewick to Portland over the Oregon-Washington R. R. & Navigation Co. line are as shown in this statement, subject to any verification that you may wish to make? These distances, I may state to the Court, are taken from the distance table, the tariff filed with the Interstate Commerce Commission, known as 6168, for the Northern Pacific.

Mr. HARWOOD.—I do not think the mileage either from the points of shipment to Portland or the fact that the Oregon-Washington Company rate to Kennewick is a shorter distance makes any difference in this case. The defendant is relying upon a supposed order of the Interstate Commerce Commission.

Mr. AUSTIN.—It is material to this extent, that order 3700, which was introduced yesterday, also makes provision for the long line meeting the competition of the shorter line, and that we bring ourselves within that order by showing the difference in distances of the two lines. Of course, the distance from Portland south to points of destination is the same in all cases. The same [81] thing is covered in the Commission's order of October 14, 1910, which was introduced yesterday. I would like to introduce this statement in evidence. Will you stipulate to that, Mr. Harwood?

Mr. HARWOOD.—With one reservation; the distance from Kennewick to Portland by the O. W. R. & N. I am having checked. The other distances I will stipulate to be correct, subject to the objection that they are immaterial, irrelevant and incompetent.

The COURT.—It will be admitted.

(The document was here admitted in evidence, and marked Defendant's Exhibit "N." (Tr. 91 and 92), a copy of which is hereto attached and marked "Appendix N.")

Mr. HARWOOD.—There is no stipulation yet with respect to Kennewick over the O. R. & N.

Mr. AUSTIN.—I ask leave to amend the answer to conform to the proofs in order that we may show the applications and orders that we have introduced here. I do not want to have any questions of insufficiency of the pleading governing the matters that have been tendered here. I will tender

such amendment to-morrow, or maybe this afternoon.

Mr. HARWOOD.—We object to that, your Honor, on the ground that it is too late. The evidence has been introduced. The trial is practically completed now, and it has proceeded upon the answer as filed, which was amended on the day the trial commenced. We object to any further amendment.

The COURT.—If it conforms to the proof, the Court will deem it amended. (Tr. 92 and 93.) [82]

Thereupon, and on the 14th day of August, 1923, said Court made and entered findings of fact and conclusions of law thereon in each of said causes, and upon said findings of fact and conclusions of law, and on said 14th day of August, 1923, judgments were respectively entered against the said defendants and in favor of the said plaintiffs, as follows:

In action No. 16741, for the sum of $3,485.96, with interest, an attorney fee of $600, and costs; in action No. 16746 for the sum of $7,198.95, with interest, an attorney fee of $1,100, and costs, and in action No. 16694, for the sum of $2,393.50, with interest, an attorney fee of $500, and costs. Within the time allowed by law this bill of exceptions was served on counsel for plaintiffs and was filed herein.

WHEREUPON, the Court being willing to preserve the record in order that its rulings may be reviewed for error, if any there be, hereby certifies

that the foregoing bill of exceptions contains all of the evidence offered or admitted upon the trial of said causes, together with the rulings of the Court thereon and the rulings of the Court given, admitting or excluding testimony at said trial and the exceptions taken to the rulings of the Court, and the exceptions allowed thereon.

IT IS FURTHER CERTIFIED that Defendants' Exhibits "A," "B," "C," "D," "E," "F," "G," "H," "I," "J" and "K," admitted in said causes, are appended hereto and made a part of the foregoing bill of exceptions.

Order Settling the Foregoing Bill of Exceptions.

WHEREUPON, said bill of exceptions is hereby settled, certified and signed, this 26 day of December, 1923, as correct in all respects and presented in due time.

(Sgd.) BOURQUIN,
United States District Judge. [83]

Stipulation Re Settlement, etc., of Bill of Exceptions.

IT IS HEREBY STIPULATED between counsel for the parties to the above-entitled actions that the foregoing bill of exceptions as tendered to said Court by the defendants may by said Court be settled, allowed, certified and signed without amendment.

Dated: San Francisco, Cal., this 13th day of December, 1923.

ALFRED J. HARWOOD,
Attorney for Plaintiffs.
HENLEY C. BOOTH,
ELMER WESTLAKE,
JAS. E. LYONS,
Attorneys for Defendants. [84]

(Title of Court and Cause—No. 16741.)

Petition for Writ of Error.

To the Honorable JOHN S. PARTRIDGE, Presiding Judge of the Above-entitled Court, and to the Judge or Judges of said District Court:

Now come the above-named defendants, Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, by Henley C. Booth, Elmer Westlake, and James E. Lyons, their attorneys, and say:

That on the 14th day of August, 1923, this Court entered a judgment herein, in favor of plaintiff and against defendants, in which judgment and proceedings prior thereunto in this cause certain errors were committed to the prejudice of these defendants, all of which will more in detail appear from the assignment of errors, which is filed with this petition;

WHEREFORE, defendants pray that a writ of error may issue in their behalf to the United States Circuit Court of Appeals for the Ninth Circuit for

the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated, may be sent to the United States [115] Circuit Court of Appeals for the Ninth Circuit.

Dated at San Francisco, Cal., this 14th day of December, 1923.

HENLEY C. BOOTH,
ELMER WESTLAKE,
JAMES E. LYONS,
Attorneys for Defendants.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [116]

(Title of Court and Cause—No. 16741.)

Assignment of Errors.

Now come the Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, the defendants in the above numbered and entitled cause, and in connection with their petition for a writ of error herein, assign the following errors, which they aver were committed by the Court upon the trial of this case and in the rendition of the judgment against the said defendants, appearing upon the record herein, to wit:

(1) The Court erred in overruling and in not sustaining the defendants' demurrer to the original complaint filed in this cause, and in holding that plaintiff was not bound to first seek relief from the

Interstate Commerce Commission before applying to the District Court.

(2) The Court erred in overruling the defendants' motion for a nonsuit.

(3) The Court erred in holding and finding that plaintiff "is entitled to recover the difference between said alleged overcharge and the charge then made by defendant, Northern Pacific Railway Company, for the haul from said station of Harrah to said main line; that the amount of the overcharge on shipments from said [117] station of Harrah is as follows: In the shipment in car No. IC 68852 the amount of the overcharge was and is the sum of $54.77 instead of the sum of $79.09 as stated in the complaint. In the case of the shipment in car No. LV 35944 the amount of the overcharge was and is the sum of $52.24 instead of $77.38 as stated in the complaint. In the shipment in car No. Erie 61092 the amount of the overcharge was and is the sum of $49.90 instead of the sum of $73.92 as stated in the complaint. In the shipment in car No. CGW 30409 the amount of the overcharge was and is the sum of $50.15 instead of $74.26 as stated in the complaint. In the shipment in car No. NP 95388, the amount of the overcharge was and is the sum of $51.12 instead of the sum of $75.04 as stated in the complaint."

(4) The Court erred in holding and finding: "That for all practical rate-making purposes said station of Harrah is intermediate between Kennewick and Portland, and also between Kennewick and the stations of delivery."

(5) The Court erred in holding and finding: "That plaintiff has been damaged by the payment of the freight charges mentioned in the complaint; that plaintiff has been damaged by the amount of the overcharges as hereinabove found, plus the interest on each overcharge at the rate of seven per cent (7%) per annum, from the date of the payment thereof to the date of judgment herein."

(6) The Court erred in holding and deciding that: "Whether or not defendants' application to be relieved from Section 4 was in proper form and time, it affords no protection in respect to the violations of Section 4 involved in the charges herein. These violations were by reason of rates initiated subsequent to the amendment of 1910, and not within the latter's continuance of rates 'lawfully existing at the time of the passage of this Act' until applications made to continue them were by the Commission determined. [118] They were only within that provision of Section 4 which provided that application for relief could be made and granted in 'special cases after investigation.' That is, rates to be thus granted or authorized, but which could not be legally charged until thus granted or authorized."

(7) The Court erred in holding and deciding that the defendants' applications to be relieved from the provisions of the 4th Section of the Interstate Commerce Act introduced in evidence herein afforded no protection in respect to the alleged violations of Section 4 of said act, involved in the complaint herein.

(8) The Court erred in holding and deciding that the 4th Section orders of the Interstate Commerce Commission introduced in evidence herein, were made without authority and are void in so far as they authorize the alleged departures from the provisions of the 4th Section of the Interstate Commerce Act, complained of in this action.

(9) The Court erred in finding and holding that plaintiffs are entitled to judgment for the sum of Six Hundred ($600.00) Dollars, or any other sum as attorney's and counsel fees herein.

(10) The Court erred in holding and deciding that the separate defenses pleaded in the defendants' answer to the complaint and the amendments thereto and in the amendments made to conform to the proof do not constitute a full and complete defense to this action.

(11) The Court erred in not rendering judgment on its findings in favor of defendants and against the plaintiff.

WHEREFORE, the said defendants pray that the judgment of the District Court may be reversed.

Dated: San Francisco, Cal., this 14th day of December, 1923.

HENLEY C. BOOTH,
ELMER WESTLAKE,
JAMES E. LYONS,
Attorneys for Defendants.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [119]

(Title of Court and Cause—No. 16741.)

Order Allowing Writ of Error.

On this 2d day of January, 1924, came the above-named Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, the defendants herein, by Henley C. Booth, Elmer Westlake and James E. Lyons, their attorneys, and filed herein and presented to this Court, their petition praying for the allowance of a writ of error and the assignment of errors intended to be urged by them, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

And the said parties having filed herein a stipulation in writing waiving bond for costs and a supersedeas bond,

On consideration whereof, this Court does hereby allow the writ of error and orders that said writ of error issue without requiring the filing of any bond.

Dated: San Francisco, Cal., this 2d day of January, 1924.

FRANK H. RUDKIN,
United States Circuit Judge.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [120]

(Title of Court and Cause—No. 16741.)

Stipulation and Order Waiving Bonds on Allowance of Writ of Error.

IT IS HEREBY STIPULATED that a writ of error may be allowed and granted upon defendants' petition therefor without the filing of any supersedeas bond or bond for costs, and that supersedeas and costs bond is hereby waived.

Dated: San Francisco, Cal., this 14th day of December, 1923.

ALFRED J. HARWOOD,
Attorney for Plaintiff.
HENLEY C. BOOTH,
ELMER WESTLAKE,
JAMES E. LYONS,
Attorneys for Defendants.

So ordered.

FRANK H. RUDKIN,
United States Circuit Judge.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [121]

(Title of Court and Cause—No. 16741.)

Praecipe for Transcript of Record.

To the Honorable WALTER B. MALING, Clerk of the Above-entitled Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit

Court of Appeals for the Ninth Circuit, pursuant to a writ of error allowed in the above-entitled cause, and to include in such transcript the following papers, to wit:

1. Complaint.
2. Answer of defendants.
3. Trial stipulation, filed March 12, 1923.
4. Minute order, March 12, 1923, allowing amendment to answer.
5. Amendment to answer.
6. Minute order, March 12, 1923, denying defendants' motion for nonsuit.
7. Memorandum decision, filed June 18, 1923, ordering judgment for plaintiff.
8. Findings of fact and conclusions of law.
9. Judgment order.
10. Stipulation and order for single bill of exceptions in cases Nos. 16,741, 16,746, and 16,694. [122]
11. All stipulations and orders extending time to serve and tender defendants' bill of exceptions.
12. Bill of exceptions.
13. Stipulation and order waiving bonds on allowance of writ of error.
14. Petition for writ of error.
15. Assignment of errors.
16. Order allowing writ of error.
17. Writ of error.
18. Citation on writ of error.
19. This praecipe.
20. Clerk's certificate to transcript.

Dated: San Francisco, California, this 3d day of January, 1924.

HENLEY C. BOOTH,
ELMER WESTLAKE,
JAMES E. LYONS,
Attorneys for Defendants.

[Endorsed]: Filed Jan. 14, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [123]

(Title of Court and Cause—No. 16694–At Law.)

Complaint.

Now come Joseph Moyse and A. P. Jacobs, co-partners doing business under the firm name and style of Jacobs, Malcolm & Burtt, and residents in the city and county of San Francisco, State of California, in the Southern Division of the Northern District of California, and complain of the defendants, Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, and for cause of action allege:

I.

That each of said plaintiffs is, and at all times herein mentioned was, a resident of said city and county of San Francisco, in the Northern District of California. That at all times during the year 1917 and at all times during the year 1918, to and including the 22d day of December, 1918, Jacobs, Malcolm & Burtt was a corporation duly organized and existing under and by virtue of the laws of the State of California. That at all times mentioned in

this complaint since the 1st day of November, 1918, said Joseph Moyse and A. P. Jacobs were, and now are, copartners doing business under the firm name and style of Jacobs, Malcolm & Burtt. That on the 15th day of November, 1918, said Jacobs, Malcolm & Burtt, a corporation, duly assigned to said copartnership all claims and demands of said corporation against the defendants, arising out of overcharges by said defendants, or either of them, on the shipments of potatoes [124] made during the year 1917, as alleged in paragraph V of this complaint.

II.

That the defendant Northern Pacific Railway Company is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Minnesota; that the defendant Southern Pacific Company is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky; that at all times herein mentioned each of said defendants was and now is a common carrier engaged in the transportation of passengers and property wholly by railroad from one state or territory of the United States to other states and territories thereof; that each of said defendants is, and at all times herein mentioned was, subject to the provisions of the Act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce," as amended.

III.

That said defendant Northern Pacific Railway

Company operates and at all times herein mentioned operated a railroad from the station of Kennewick, in the State of Washington, to the city of Portland, in the State of Oregon. That said defendant Southern Pacific Company operates and at all times herein mentioned operated a railroad from the city of Portland to San Francisco, Oakland, Stockton and San Jose, in the State of California (hereinafter called said points of delivery). That said railroad, from the said station of Kennewick to the said city of Portland, passes through the stations of Yethanot, Moxee, Wapato, Toppenish, Mabton, Yakima, Sunnyside, Nass, Satus, Farron, Outlook, Zillah, Harrah, Ashue and Cowiche, which said stations are hereinafter called said intermediate stations. That all of said intermediate stations are in the State of Washington.

IV.

That prior to the year 1917, said defendants established a through route and joint rate on potatoes from said station of Kennewick to said points of delivery, which said through route and joint rate so established by defendants was in [125] effect during and at the times that all the shipments described in paragraph V of this complaint moved. That said through route from said station of Kennewick to said points of delivery passes through said intermediate stations. That said railroad and said joint route from said station of Kennewick to said points of delivery passes through said intermediate stations. That it is a less distance from said intermediate stations, and each of them, to said

points of delivery than it is from said station of Kennewick to said points of delivery. That it is a longer distance from said station of Kennewick over the same line and route in the same direction to said points of delivery than it is from said intermediate stations to said points of delivery, the shorter being included within the longer distance.

V.

That between the 13th day of January, 1917, and the 18th day of February, 1922, viz., on the dates hereinafter stated in this paragraph of this complaint, said Jacobs, Malcom & Burtt caused to be shipped and transported over the lines of the defendants, Northern Pacific Railway Company and Southern Pacific Company, from said intermediate stations to said points of delivery, fifty-one carloads of potatoes; that said fifty-one carloads of potatoes were all transported from said intermediate stations to the said points of delivery.

That upon arrival of said shipments at said points of delivery, the defendants demanded that said Jacobs, Malcom & Burtt pay for the transportation thereof charges in excess of the charges then made by defendants for the transportation of the same quantity and of like kind of property for a longer distance over the same line in the same direction, the shorter being included within the longer distance; that is to say, the defendants demanded that said Jacobs, Malcolm & Burtt pay for the transportation of said potatoes charges greater than said defendants then charged for the transportation of potatoes from the said station of Kennewick to

the said points of delivery. That said Jacobs, Malcolm & Burtt thereupon paid said charges so demanded by defendants, which said charges so paid by said [126] Jacobs, Malcolm & Burtt were greater than the compensation then charged by defendants for the transportation of like kind of property for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

That the following statement shows the date of shipment of each carload, the number of the car in which it was shipped, the station from which the shipment was made, the place of destination of each shipment, the amount of the charges paid by said Jacobs, Malcolm & Burtt for the transportation thereof, the date that said charges were paid, and the amount by which the charges so paid exceeded the charges then made for the transportation of the same quantity of like kind of property for the greater distance, as aforesaid, which said last-mentioned amount appears under the head "Overcharge" in the following statement: [127]

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
Jan. 14, 1917	CBQ–38610	Moxee	San Francisco	$147.20	Feb. 6, 1917	$39.20
Sept. 14, 1917	NP–96773	Yethanot	San Francisco	$136.50	Sept. 22, 1917	$39.00
Oct. 2, 1917	NP–98630	Wapato	San Francisco	$120.86	Oct. 16, 1917	$27.89
Oct. 2, 1917	NP–98246	Wapato	San Francisco	$120.86	Oct. 16, 1917	$27.89
Oct. 20, 1917	NP–96507	Toppenish	San Francisco	$134.98	Nov. 14, 1917	$31.15
Dec. 12, 1917	NP–95816	Mabton	San Francisco	$175.71	Dec. 28, 1917	$40.56
Mar. 26, 1920	NP–96203	Yakima	San Francisco	$178.95	Apr. 4, 1920	$42.00
Apr. 5, 1920	B&O–14161	Sunnyside	San Francisco	$147.15	Apr. 26, 1920	$34.54
Apr. 5, 1920	Erie–66988	Sunnyside	San Francisco	$147.49	Apr. 5, 1920	$34.60
Mar. 24, 1921	NP–94946	Mabton	San Francisco	$223.40	Apr. 11, 1921	$52.20
Mar. 31, 1921	NP–94838	Nass	San Francisco	$255.56	Apr. 21, 1921	$63.21
Apr. 14, 1921	NP–97909	Wapato	San Francisco	$284.13	Apr. 29, 1921	$66.99
June 1, 1921	CBQ–36644	Wapato	San Francisco	$265.86	June 13, 1921	$62.68
Dec. 9, 1921	SLSF–1793	Wapato	San Francisco	$235.67	Dec. 22, 1921	$55.57
Sept. 30, 1921	NP–94920	Satus	San Francisco	$214.94	Sept. 30, 1921	$55.80
Oct. 3, 1921	NP–94980	Satus	San Francisco	$225.34	Oct. 17, 1921	$53.04
Oct. 3, 1921	NP–94693	Satus	San Francisco	$237.76	Oct. 9, 1921	$56.06

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
Oct. 4, 1921	NP–96952	Toppenish	San Francisco	$232.59	Oct. 9, 1921	$61.18
Oct. 4, 1921	B&O–15667	Toppenish	San Francisco	$224.17	Oct. 20, 1921	$53.86
Oct. 5, 1921	NP–96552	Toppenish	San Francisco	$256.89	Oct. 20, 1921	$60.58
Oct. 12, 1921	NP–38575	Farron	San Francisco	$201.87	Oct. 31, 1921	$60.25
Oct. 15, 1921	NP–94910	Outlook	Oakland	$329.15	Oct. 31, 1921	$78.61
Oct. 24, 1921	NP–97806	Zillah	San Francisco	$292.32	Nov. 4, 1921	$64.71
Oct. 31, 1921	DLW–6647	Toppenish	San Francisco	$255.89	Nov. 21, 1921	$75.03
Nov. 4, 1921	CBQ–36849	Toppenish	San Francisco	$220.29	Nov. 14, 1921	$52.41
Nov. 4, 1921	NP–98410	Toppenish	Oakland	$223.54	Nov. 25, 1921	$52.71
Nov. 7, 1921	NYC–155887	Harrah	San Francisco	$250.25	Nov. 25, 1921	$74.71
Nov. 8, 1921	PRR–104599	Ashue	San Francisco	$259.22	Nov. 21, 1921	$76.02
Nov. 9, 1921	LV–35599	Toppenish	Stockton	$223.22	Dec. 3, 1921	$52.66
Nov. 10, 1921	Sou–343012	Cowiche	San Francisco	$241.13	Nov. 21, 1921	$70.71
Nov. 29, 1921	SLSF–2156	Sunnyside	Oakland	$221.40	Dec. 23, 1921	$52.20
Nov. 9, 1921	Erie–61425	Harrah	Oakland	$241.20	Dec. 1, 1921	$72.00
Nov. 5, 1921	NP–98744	Toppenish	San Francisco	$237.02	Nov. 25, 1921	$55.88
Dec. 2, 1921	NP–97870	Wapato	San Francisco	$221.10	Dec. 19, 1921	$51.90
Dec. 6, 1921	SLSF–1947	Toppenish	San Francisco	$228.52	Dec. 22, 1921	$53.69

[128]

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
Dec. 10, 1921	CBQ–38075	Wapato	San Francisco	$221.30	Dec. 30, 1921	$52.10
Dec. 2, 1921	NP–97583	Wapato	San Jose	$229.70	Dec. 22, 1921	$54.16
Jan. 7, 1922	NP–95550	Wapato	San Francisco	$220.74	Jan. 20, 1922	$48.83
Jan. 9, 1922	NYC–145625	Yakima	Oakland	$206.99	Feb. 1, 1922	$50.37
Jan. 11, 1922	NP–95109	Toppenish	San Francisco	$200.58	Jan. 20, 1922	$52.79
Jan. 11, 1922	NP–95176	Toppenish	San Francisco	$202.76	Jan. 24, 1922	$49.33
Jan. 14, 1922	NP–95172	Toppenish	San Francisco	$203.10	Jan. 31, 1922	$49.41
Jan. 21, 1922	PI–608457	Toppenish	San Francisco	$201.50	Feb. 3, 1922	$49.00
Jan. 21, 1922	NP–95490	Toppenish	San Francisco	$199.87	Feb. 10, 1922	$48.54
Jan. 24, 1922	NP–98082	Toppenish	San Francisco	$201.19	Feb. 3, 1922.	$48.94
Jan. 24, 1922	NP–96247	Toppenish	San Francisco	$200.53	Feb. 3, 1922	$48.78
Jan. 24, 1922	NP–96992	Toppenish	San Francisco	$203.16	Feb. 3, 1922	$49.34
Jan. 24, 1922	NP–97291	Toppenish	San Francisco	$202.33	Feb. 7, 1922	$49.20
Jan. 31, 1922	NP–94524	Toppenish	San Francisco	$205.13	Feb. 17, 1922	$49.90
Jan. 30, 1922	NP–94812	Outlook	Stockton	$259.38	Feb. 14, 1922	$63.11
Feb. 1, 1922	NP–95292	Toppenish	San Francisco	$206.11	Feb. 17, 1922	$50.04

That all of said shipments which were made in the year 1917 were made by said Jacobs, Malcolm & Burtt, a corporation, and the charges paid thereon to defendants were paid by said Jacobs, Malcolm & Burtt, a corporation. That all of said shipments made in the years 1920, 1921 and 1922 were made by said copartnership of Jacobs, Malcolm & Burtt and the charges paid thereon to the defendants were paid by said copartnership.

VI.

That neither of said defendants ever applied to the Interstate Commerce Commission for authority to charge less from said station of Kennewick to said points of delivery than from said intermediate stations to said points of delivery. That a lower rate or compensation for the haul from said station of Kennewick to said points of delivery did not exist on the 18th day of June, 1910, the time of the passage of the Act of Congress of June 18, 1910, amendatory to said Act of Congress of February 4, 1887. That the Interstate Commerce Commission never authorized said defendants, or either of them, to charge less from Kennewick to said points of delivery than from said intermediate stations to said points of delivery. [129]

VII.

That at all times between the 31st day of December, 1917, and the 1st day of March, 1920, said railroads of said defendants were in the control and possession of and were used and operated by the President of the United States. That said railroads were so possessed, controlled, used and operated by

the President pursuant to an Act of Congress entitled "An Act making appropriations for the support of the Army." etc., approved August 29, 1916, and pursuant to an Act of Congress approved February 28, 1920.

VIII.

That neither of said defendants has paid to said Jacobs, Malcolm & Burtt, a corporation, or to the plaintiffs, the amount of said overcharges, or any part thereof, or any interest thereon.

IX.

That prior to the commencement of this action the plaintiffs filed with the clerk of the county in which the principal place of business of said copartnership is situated, to wit, the city and county of San Francisco, a certificate stating the names in full of all of the members of said partnership, and their places of residence. That prior to the commencement of this action said certificate was published once a week for four successive weeks in a newspaper published in said county. That said certificate so filed and published, as aforesaid, was signed by said partners and acknowledged before an officer authorized to take the acknowledgment of conveyances of real property.

WHEREFORE plaintiffs pray judgment against said defendants for the amount of said overcharges, as alleged in paragraph V, to wit, for the sum of Two Thousand Seven Hundred and Fifteen and 33/100 Dollars ($2,715.33), together with interest on each overcharge at the rate of seven per cent per an-

num from the date of payment thereof. And the plaintiffs also pray judgment for their costs of suit.

ALFRED J. HARWOOD,
Attorney for Plaintiffs. [130]

State of California,
City and County of San Francisco,—ss.

A. P. Jacobs, being first duly sworn, deposes and says: That he is one of the plaintiffs above named; that he has read the within and foregoing complaint and knows the contents thereof and that the same is true of his own knowledge.

A. P. JACOBS.

Subscribed and sworn to before me this 27th day of February, 1922.

[Seal] E. M. CLARK,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed:] Filed Feb. 28, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [131]

(Title of Court and Cause—No. 16694.)

Answer of Defendants, Northern Pacific Railway Company and Southern Pacific Company.

Now come the defendants, Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, and, for answer to the complaint herein, admit, aver and deny as follows, to wit:

I.

Aver that they have not sufficient knowledge, information or belief upon the subject to enable them to answer the allegations of paragraph I of said complaint, and, upon that ground, deny each and every, all and singular, the allegations in said paragraph contained.

II.

Deny that the railroad line of defendant Northern Pacific Railway Company, between the station of Kennewick, in the State of Washington, and the city of Portland, in the State of Oregon, passes through the stations of Yethanot, Moxee, Farron, Harrah, Ashue or Cowiche, or any of them, and deny that said stations, or any of them, are intermediate points upon said line of railway between Kennewick and Portland.

III.

Deny that said through route from said station of Kennewick to the said points of delivery named in paragraph III of the complaint, or any of them, passes through said stations of Yethanot, Moxee, Farron, Harrah, Ashue or Cowiche, or any of them; and deny that said railroad or said joint through route from said station of Kennewick to said points of delivery, or any of them, pass through said last-named stations; and deny that said last-named stations, or any of them, are upon the line or route of railroad between said station of Kennewick and said points of delivery.

IV.

Admit, subject to verification, that the plaintiff

and its [132] assignor made the shipments of potatoes between the points described in paragraph V of said complaint and paid freight charges thereon, as alleged in said paragraph.

Defendants aver that they have not sufficient knowledge, information or belief upon the subject to enable them to answer the allegations of paragraph V of the complaint with respect to the shipments consigned to, or charges paid by, either the corporation or the partnership known as Jacobs, Malcolm & Burtt, and, upon that ground, deny that all, or any, of said shipments which were made during the year 1917, were made by Jacobs, Malcolm & Burtt, a corporation, or that the charges paid upon said shipments, or any of them, to defendants, or either of them, were paid by said Jacobs, Malcolm & Burtt, a corporation; and deny that all, or any, of said shipments made in the years 1920, 1921, or 1922, or during any part thereof, were made by said copartnership of Jacobs, Malcolm & Burtt, or that the charges paid upon said shipments, or any of them, to the defendants, or either of them, were paid by said copartnership.

V.

Deny that neither of defendants ever applied to the Interstate Commerce Commission for authority to charge less from said station of Kennewick to said points of delivery, or any of them, than from said intermediate stations, or any of them, to said points of delivery, or any of them.

VI.

Aver that they have not sufficient knowledge, in-

formation or belief upon the subject to enable them to answer any of the allegations of paragraph IX of said complaint, and, upon that ground, deny each and every, all and singular, the allegations in said paragraph contained.

SECOND SEPARATE DEFENSE.

And for a further and separate answer and defense to said complaint, defendants aver that the stations of Yethanot, Moxee, Farron, Harrah, Ashue and Cowiche, and each of them, are not situated upon the line of defendant Northern Pacific Railway Company passing between the city of Kennewick, in the State of Washington, and the city of Portland, in the State of Oregon, [133] but said stations are, and each of them is, situated upon a branch line of defendant Northern Pacific Railway Company, and that said stations are not, nor is any of said stations, intermediate upon said line of railway of Northern Pacific Railway Company passing between said city of Kennewick and said city of Portland, or between said city of Kennewick and any of the points of destination mentioned in the complaint.

THIRD SEPARATE DEFENSE.

And for a further, separate and third answer and defense to said complaint, defendants aver that on or about the 11th day of February, 1911, these defendants filed with the Interstate Commerce Commission an application in writing requesting that said Commission authorize and permit said defendants to charge rates upon potatoes and other commodities between the cities of San Francisco,

Oakland, San Jose, Stockton, Marysville and Los Angeles, and other points in the State of California, and the town of Pasco, in the State of Washington, lower than the rates from said California points to points on the Northern Pacific Railway Company intermediate to said town of Pasco, Washington. That the station of Kennewick is situated upon the line of defendant Northern Pacific Railway Company, in the State of Washington, intermediate to said California points herein named, and said station of Pasco. That said application has never been cancelled or withdrawn and the same has never been granted or refused or acted upon, either wholly or in part, by the interstate Commerce Commission.

FOURTH SEPARATE DEFENSE.

For a further, separate and fourth answer and defense to said complaint, defendants aver that neither the plaintiff nor its assignors has, prior to the commencement of this action, or at all, applied to the Interstate Commerce Commission for reparation for on account of the matters and things alleged in said complaint, nor has said Commission ever made an order directing either of the defendants to pay to the plaintiff, or its assignor, any sum whatsoever for or on [134] account of the assessment or collection of freight charges upon any of the shipments alleged in the complaint.

FIFTH SEPARATE DEFENSE.

And for a further, separate and fifth answer and defense to said complaint, defendants aver that as to all shipments alleged to have moved, as

described in the complaint, prior to the 28th day of February, 1918, the cause of action attempted to be set forth in the complaint is barred by the provisions of Section 339, Subdivision 1 of the Code of Civil Procedure of the State of California.

SIXTH SEPARATE DEFENSE.

And for a further, separate and sixth defense to said complaint defendants aver that as to all shipments alleged in the complaint to have moved prior to the 28th day of February, 1920, the cause of action attempted to be set forth in the complaint is barred by the provisions of Section 339, Subdivision 1 of the Code of Civil Procedure of the State of California.

SEVENTH SEPARATE DEFENSE.

And for a further, separate and seventh answer and defense to said complaint, defendants aver that as to any shipments alleged in the complaint to have moved prior to the 31st day of December, 1917 (even excluding the period of federal control, which extended from January 1, 1918, until and including February 29, 1920), the cause of action attempted to set forth in the complaint is barred by the provisions of Section 339, Subdivision 1, of the Code of Civil Procedure of the State of California.

EIGHTH SEPARATE DEFENSE.

And for a further, separate and eighth answer and defense to the complaint herein, defendants aver that as to any shipments alleged in the complaint to have moved prior to February 28, 1917, the cause of action attempted to be set forth in the complaint

is barred by the provisions of Section 338, Subdivision 1, of the Code of Civil Procedure of the State of California. [135]

NINTH SEPARATE DEFENSE.

And for a further, separate and ninth answer and defense to said complaint, defendants aver upon information and belief, that neither plaintiff nor its assignors has been damaged by the payment of any of the freight charges mentioned in the complaint.

WHEREFORE, said defendants pray that plaintiff take nothing by its said action and that they may be dismissed hence with their costs.

ELMER WESTLAKE,
JAMES E. LYONS,
FRANK B. AUSTIN,
Attorneys for Defendants.

State of California,
City and County of San Francisco,—ss.

G. L. King, being first duly sworn, deposes and says, that he is an officer, to wit, assistant secretary of defendant Southern Pacific Company, a corporation, and, as such officer, is duly authorized to and does make this verification for and on behalf of said defendant; that he has read the foregoing answer and knows the contents thereof and the same is true of his own knowledge, except as to the matters which are therein stated on information or belief and as to those matters that he believes it to be true.

G. L. KING.

Subscribed and sworn to before me this 28th day of September, 1922.

[Seal] FRANK HARVEY,
Notary Public in and for the City and County of San Francisco, State of California.

Due service of the within answer is admitted this 28th day of September, 1922.

A. J. HARWOOD,
Attorney for Plaintiff.

[Endorsed]: Filed Sep. 28, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [136]

(Title of Court and Cause—No. 16,694.)

Trial Stipulation.

It is stipulated that all of the allegations of paragraphs I and IX of the complaint are true and that no evidence thereof need be offered at the trial.

It is further stipulated that the allegations of the complaint denied by the following part of the answers are true and that no evidence thereof need be offered at the trial. The part of said answer referred to is as follows:

> "Defendants aver that they have not sufficient knowledge, information or belief upon the subject to enable them to answer the allegations of paragraph V of the complaint with respect to the shipments consigned to, or charges paid by, either the corporation or the partnership known as Jacobs, Malcolm & Burtt and, upon that ground, deny that all, or

any, of said shipments which were made during the year 1917, were made by Jacobs, Malcolm & Burtt, a corporation, or that the charges paid upon said shipments, or any of them, to defendants, or either of them, were paid by said Jacobs, Malcolm & Burtt, a corporation; and deny that all, or any, of said shipments made in the years 1920, 1921, or 1922, or during any part thereof, were made by said copartnership of Jacobs, Malcolm & Burtt, or that the charges paid upon said shipments, or any of them, to the defendants, or either of them, were paid by said copartnership.

Dated: March 9, 1923.

ALFRED J. HARWOOD,
Attorney for Plaintiff,
ELMER WESTLAKE,
J. E. LYONS,
FRANK B. AUSTIN,
Attorneys for Defendants.

So ordered.

R. S. BEAN,
Judge.

[Endorsed]: Filed Mch. 12, 1923. Walter B. Maling, Clerk. [137]

At a stated term, to wit, the March term, A. D. 1923, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco on Wednesday, the 14th day of March, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable GEORGE M. BOURQUIN, District Judge for the District of Montana, designated to hold and holding this cause.

(Title of Cause—No. 16,694.)

Minutes of Court—March 14, 1923—Order Allowing Defendant to File an Amendment to Answer.

* * * * * * * * *

Ordered that defendant may file an amendment to answer.

* * * * * * * * *

Defendant moved for a nonsuit on the grounds stated; which motion was submitted after arguments by counsel and being fully considered was denied.

* * * * * * * * *

[138]

(Title of Court and Cause—No. 16,694.)

Amendment to Answer.

Now come the defendants above named, and, by

leave of Court first had and obtained, file this their amendment to their answer hertofore filed herein as follows:

THIRD SEPARATE DEFENSE.

And for a further, separate and third answer and defense to said complaint, defendants aver that on or about the 11th day of February, 1911, these defendants filed with the Interstate Commerce Commission an application in writing requesting that said commission authorize and permit said defendants to charge rates upon potatoes and other commodities between the cities of San Francisco, Oakland, San Jose, Stockton, Marysville and Los Angeles, and other points in the State of California, and the town of Pasco, in the State of Washington, lower than the rates from said California points to points on the Northern Pacific Railway Company intermediate to said town of Pasco, Washington.

On or about the third day of February, 1914, the Interstate Commerce Commission duly gave, made and entered its order, known as Fourth Section Order No. 3700, a copy of which is hereto attached, marked Exhibit "A," and made a part hereof.

That the station of Kennewick is situated upon the line of defendant Northern Pacific Railway Company, in the State of Washington, 2.7 miles west of said station of Pasco and the same is a point on the said line adjacent and in close proximity to said station of Pasco, and is also intermediate to said California points herein named and said station of Pasco. That on or about the 17th

day of May, 1911, the rates on potatoes from Pasco to said California points herein named were extended by said defendants to said station of Kennewick, and ever since that time said rates from Kennewick to said California destinations have been the same as the rates from Pasco to said destinations. [139]

That said application above referred to, which was filed with the Interstate Commerce Commission on or about the 11th day of February, 1911, has never been cancelled or withdrawn, and the same has never been granted or refused or acted upon, either wholly or in part, by the Interstate Commerce Commission; that said Fourth Section Order No. 3700 has never been vacated, modified or set aside in whole or in part and was in full force and effect during all the times mentioned in the complaint herein and at the time of the movement of each of the shipments therein referred to, except that section 6 thereof has been eliminated.

ELMER WESTLAKE,
J. E. LYONS,
F. B. AUSTIN,
Attorneys for Defendants. [140]

State of California,
City and County of San Francisco,—ss.

G. L. King, being duly sworn, deposes and says: That he is an officer, to wit, assistant secretary of Southern Pacific Company, a corporation, one of the defendants named in the foregoing amendment to answer, and as such officer he is duly authoriezd to and does make this verification for and on behalf

of said corporation; that he has read the foregoing amendment to answer and knows the contents thereof, and the same is true of his knowledge, except as to the matters which are therein stated on information or belief and as to such matters he believes it to be true.

G. L. KING.

Subscribed and sworn to before me this 14th day of March, 1923.

[Seal] FRANK HARVEY,

Notary Public in and for the City and County of San Francisco, State of California. [141]

Exhibit "A."

"The Commission being of the opinion that the convenience of the carriers, the public, and the Commission will be better served by assembling in one general fourth section order, divided into numbered sections for convenient tariff reference, the general fourth section order known as Fourth Section Order No. 100, General No. 2; Fourth Section Order No. 485, General No. 9; Fourth Section Order No. 839, General No. 11; and Fourth Section Order No. 2200, General No. 12 and experience having suggested certain modifications in the descriptions of conditions under which relief has been afforded by these orders, and certain additional situations as to which carriers may be relieved from the operation of said section, therefore,

"It is ordered, That Fourth Section Order No. 100, General No. 2; Fourth Section Order No. 485, General No. 9; Fourth Section Order No. 839, Gen-

eral No. 11; and Fourth Section Order No. 2200, General No. 12, be and the same are hereby, vacated and set aside as of March 15, 1914.

"It is further ordered, That effective March 15, 1914, as to and confined in all cases to rates and fares which are included in and covered by applications for relief from the provisions of the fourth section of the act to regulate commerce that were filed with the Commission on or before February 17, 1911, and until the applications including and covering such rates or fares have been passed on by the Commission, carriers may file with the Commission, in the manner and form prescribed by law and by the Commissioner's regulations, such changes in rates and fares as occur in the ordinary course of their business, continuing higher rates or fares at intermediate points, and through rates or fares higher than the combinations of intermediate rates or fares, provided that in so doing the discrimination against intermediate points is not thereby increased. [142]

"It is further ordered, That as to and confined in all cases to rates which are included in and covered by applications as above described, carriers may file with the Commission, in the manner and form prescribed by law and by the Commission's regulations, changes in rates under the following conditions, although the discrimination against intermediate points is hereby increased.

"Section 1. A through rate which is in excess of the aggregate of the intermediate rates lawfully

published and filed with the Commission may be reduced to equal the sum of the intermediate rates.

"Section 2. Where a through rate has been, or is hereafter, reduced under the authority of section 1 of this order, carriers maintaining through rates via other routes between the same points may meet the rate so made by the route initiating the reduction.

"Section 3. Where a reduction is made in the rate between two points under the authority of section 1 of this order, such reduction may extend to all points in the group which takes the same rates as does the point from or to which the rate has been reduced.

"Sec. 4. Where through rates are in effect which exceed the lowest combination of rates lawfully published and filed with the Commission, carriers may correct said through rates by reducing the same to equal such lowest combination.

"Sec. 5. A longer line or route may reduce the rates in effect between the same points or groups of points to meet the rates of a shorter line or route when the present rates via either line do not conform to the fourth section of the act, under the following circumstances:

(a) Where the longer line is meeting a reduction in rates initiated by the shorter line. [143]

(b) Where the longer line has not at any time heretofore met the rates of the shorter line.

"Sec. 6. A newly constructed line publishing rates from and to its junction points under the authority contained in paragraph (b) of section 5,

may establish from and to its local stations rates in harmony with those established from and to junction points.

"Sec. 7. Carriers whose rates between certain points do not conform to the fourth section of the act, which rates have been made lower than rates at intermediate points to meet the competition of water or rail-and-water carriers between the same points, may make such further reductions in rates as may be required to continue to effectively meet the competition of rail-and-water or all-water lines.

"Sec. 8. Where rates are in effect from or to a point that are lower than rates effective from or to intermediate points, carriers may extend the application of such rates to, or establish rates made with relation thereto at, points on the same line adjacent or in close proximity thereto, provided that no higher rates are maintained from and to points intermediate to the former point and the new point to which the application of the same or relative rates has been extended.

"Sec. 9. Where there is a rate on a commodity from or to one or more points in an established group or points from and to which rates are ordinarily the same, but the rate on the said commodity does not apply at all points in the said group, such rate may be made applicable to or from all of such other points.

"Sec. 10. Where there is a definite and fixed relation between the rates from and to adjacent or contiguous groups of points, and the rates to or from one of said groups are changed, correspond-

ing changes may be made in the rates of the other [144] groups to preserve such relation.

"Sec. 11. In cases where no through rates are in effect via the various routes or gateways between two points, and the combination of lawfully published and filed rates via one gateway makes less than the combination via the other gateway, a through rate may be established on the basis of the combination via the gateway over which the lowest combination can be made, and made applicable via all gateways.

"Sec. 12. In cases where through rates are in effect between two points, via one or more routes or gateways, which are higher than the combination of lawfully published and filed rates via one of these gateways, different carload minima being used on opposite sides of the gateway, a through rate may be established equal to the lowest combination of lawfully published and filed rates, using the higher of the carload minima but continuing the present higher through rate if based upon a lower carload minimum.

"The Commission does not hereby approve any rates that may be filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the act.

"And it is further ordered, That when the Commission passes upon any application for relief from the provisions of the fourth section with respect to the rates referred to herein, the order issued with relation thereto will automatically cancel the

authority herein granted as to the rates covered and affected by such order."

[Endorsed]: Filed Mch. 14, 1923. Walter B. Maling, Clerk. [145]

At a stated term, to wit, the March term, A. D. 1923, of the Southern Division of the United States District Court, in and for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 18th day of June, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable MAURICE T. DOOLING, District Judge.

(Title of Cause—No. 16694.)

Minutes of Court—June 18, 1923—Order for Judgment.

In accordance with the decision of the Honorable George M. Bourquin, United States District Judge for the District of Montana (before whom this case was heretofore tried) which said decision is this day filed.

IT IS ORDERED that judgment be entered herein in favor of plaintiff and against the defendants upon special findings to be filed. [146]

(Title of Court and Cause.—No. 16694.)

Findings of Fact and Conclusions of Law.

The above-entitled action came duly on for trial on the 14th day of March, 1923, the plaintiffs being represented by Alfred J. Harwood, their attorney, and the defendants by Messrs. Elmer Westlake, James E. Lyons and Frank B. Austin, their attorneys.

Said action was tried on the 14th and 15th days of March, 1923, and was thereupon submitted to the Court for its decision. After due consideration the Court makes and files this its decision, embracing its findings of fact and conclusions of law, as follows:

I.

That all of the allegations of subdivisions I, II, IV, VI, VII, VIII and IX of the complaint herein, are true and are sustained by evidence.

II.

That all of the allegations of subdivisions III and V of the complaint, are true and are sustained by the evidence except as otherwise specifically found by finding of fact number IV, but except as otherwise specifically found in finding of fact number IV, all of the allegations of subdivisions III and V of the complaint are true and are sustained by the evidence.

III.

That the reasonable sum to be allowed plaintiffs, for and as attorney's and counsel fees herein, is the sum of five hundred ($500.00) dollars, which

said sum is hereby taxed as part of the costs of the case.

IV.

That the stations, Yethanot, Moxee, Farron, Harrah, Ashue and Cowiche, mentioned and described in Subdivisions III and V of the complaint are not on the main line of the defendant, [147] Northern Pacific Railway Company, between Kennewick and Portland, but are on short branch or spur lines which connect with said main line between Kennewick and Portland; that said stations are distant from the main line as follows, viz.:

Name of Station	Distance from Main Line in Miles.
Yethanot	2.2
Moxee	9.0
Farron	8.1
Harrah	9.5
Ashue	5.2
Cowiche	9.2

that the points from which said branch lines to said stations above mentioned diverge from the said main line, are all more than 67 miles west of Kennewick, and are all intermediate between Kennewick and Portland. That in case of shipments from said stations, the plaintiffs are not entitled to recover the full amount of the alleged overcharge stated in subdivision V of the complaint, but are entitled to recover the difference between said alleged overcharge and the charge then made by defendant, Northern Pacific Railway Company, for the haul from said stations re-

spectively to said main line; that the amount of the overcharge on shipments from said stations is as follows: In shipment from Moxee in car number CBQ 38610, the amount of the overcharge was and is the sum of $26.14 instead of the sum of $39.20 as stated in the complaint. In the case of the shipment from Yethanot in car No. NP 96773, the amount of the overcharge was and is the sum of $26.00 instead of $39.00 as stated in the complaint. In the shipment from Farron in car No. NP 38575, the amount of the overcharge was and is the sum of $40.67 instead of the sum of $60.25 as stated in the complaint. In the shipment from Harrah in car No. NYC 155897 the amount of the overcharge was and is the sum of $50.44 instead of $74.71 as stated in the complaint. In the shipment from Ashue in car No. PRR 104599, the amount of the overcharge was and is the sum of $50.69 instead of the sum of $76.02 as stated in the complaint. In the shipment from Kowiche in car No. Sou–343012 the amount [148] of the overcharge was and is the sum of $47.15 instead of the sum of $70.71 as stated in the complaint. In the shipment from Harrah in car No. Erie 61425, the amount of the overcharge was and is the sum of $48.60 instead of the sum of $72.00 as stated in the complaint. That for all practical rate-making purposes said stations mentioned in this finding are intermediate between Kennewick and Portland, and also between Kennewick and the stations of delivery.

V.

With relation to the second separate defense set

up in defendant's answer, the Court finds as follows: that the stations mentioned in said separate defense are not on the line of the Northern Pacific Railway Company passing between Portland and Kennewick, but are on short branch lines which diverge from said main line, as more specifically appears in finding of fact IV; that for all practical rate-making purposes said stations are intermediate between Kennewick and Portland, and between Kennewick and the points of destination mentioned in the complaint.

VI.

That on October 14, 1910, the Interstate Commerce Commission made an order in the words and figures set forth in Exhibit "A," attached to and made a part of these findings; that on December 16, 1910, the defendants filed with the Interstate Commerce Commission a so-called application for relief from the provisions of the fourth section of the Interstate Commerce Act, a copy of which said so-called application is marked Exhibit "B" and made a part of these findings; that on December 16, 1910, said defendants filed with the Interstate Commerce a so-called application for relief from the provisions of the fourth section of the Interstate Commerce Act, a copy of which said so-called application is marked Exhibit "C," and made a part of these findings.

That on or about the 11th day of February, 1911, the defendants filed with the Interstate Commerce Commission an application in writing requesting that said Commission to [149] authorize and

permit said defendants to charge rates upon potatoes and other commodities between the cities of San Francisco, Oakland, San Jose, Stockton, Marysville and Los Angeles, and other points in the State of California, and the town of Pasco, in the State of Washington, lower than the rates from said California points to points on the Northern Pacific Railway Company intermediate to said town of Pasco, Washington: that a copy of said application is annexed to and made a part of these findings and marked Exhibit "D."

That on or about February 3d, 1914, the Interstate Commerce Commission made and entered an order denominated, "Fourth Section Order No. 3700"; that the copy of said order, marked Exhibit "A," and attached to the amendment to the answer of the defendants, is a true copy of said order, except that before the part of the said order set forth in said Exhibit "A" the following occurs, viz.: "In the matter of permitting ordinary changes in rates pending action upon applications for relief from the provisions of the Fourth Section of the Act to Regulate Commerce as amended June 18, 1910." That the station of Kennewick is situated upon the line of defendant Northern Pacific Railway Company, in the State of Washington, three miles west of said station of Pasco and is also intermediate to said California points named in the complaint, and said station of Pasco. That on or about the 17th day of May, 1911, the rates on potatoes from Pasco to said California points herein named were extended by said defendants to

said station of Kennewick, and ever since that time said rates from Kennewick to said California destinations have been the same as the rates from Pasco to said destinations; that said station of Pasco is on the east side and said station of Kennewick is on the west side of the Columbia River.

That said application above referred to, which was filed with the Interstate Commerce Commission on or about the 11th day of February, 1911, has never been cancelled or withdrawn, and the same has never been granted or refused or acted [150] upon, either wholly or in part, by the Interstate Commerce Commission; that said Fourth Section Order No. 3700 has never been vacated, modified or set aside in whole or in part, except that Section 6 thereof has been eliminated.

VII.

That the allegations of the alleged fourth separate defense pleaded in the answer of the defendants are true and are sustained by the evidence.

VIII.

That the allegations of the alleged fifth separate defense pleaded in the said answer are not true and are not sustained by the evidence; that as to all shipments alleged to have moved as described in the complaint, prior to February 28th, 1918, the cause of action is not barred by the provisions of section 339, subdivision one of the Code of Civil Procedure of the State of California.

IX.

That the allegations of the alleged sixth separate

defense pleaded in said answer are not true and are not sustained by the evidence; that as to all shipments alleged in the complaint to have moved prior to the 28th day of February, 1920, the cause of action is not barred by the provisions of section 339, subdivision one, of the Code of Civil Procedure of the State of California.

X.

That the allegations of the alleged seventh separate defense pleaded in said answer, are not true and are not sustained by the evidence; that as to any shipments alleged in the complaint to have moved prior to the 31st day of December, 1917 (even excluding the period of federal control which extended from January 1, 1918, until and including February 29, 1920), the cause of action set forth in the complaint is not barred by provision of section 339, subdivision one of the Code of Civil Procedure of the State of California.

XI.

That the causes of action based on the six shipments [151] first described in the schedule set forth in subdivision V of the complaint are barred by the provisions of Section 16 of the Interstate Commerce Act.

XII.

That plaintiffs and their assignors have been damaged by the payment of the freight charges mentioned in the complaint; that with the exception of the causes of action which are barred as found in finding of fact XI, the plaintiffs and their assignors have been damaged by the amount of the

overcharges as hereinabove found, plus the interest on each overcharge at the rate of seven per cent (7%) per annum, from the date of the payment thereof to the date of judgment herein.

CONCLUSIONS OF LAW.

As conclusions of law from the foregoing findings of fact the Court finds:

I.

That plaintiffs are entitled to judgment against defendants for the sum of two thousand three hundred ninety-three dollars and fifty cents ($2,393.50), being the total amount of the overcharges collected by defendants, except the overcharges the causes of action to recover which are barred by limitation as found in finding XI, together with interest on each separate overcharge at the rate of seven per cent (7%) per annum from the date of the payment thereof as alleged in the complaint to the date of judgment; that the total amount of said interest to the 1st day of July, 1923, is the sum of two hundred eighty-two dollars and twelve cents ($282.12); that the interest on said overcharges amounts to the sum of forty-six ($.46) cents per day.

II.

That plaintiffs are entitled to judgment for the sum of five hundred ($500.00) dollars as attorney's and counsel fees herein, which said sum shall be taxed as part of the costs of the case.

III.

That plaintiffs are entitled to judgment for their cost of suit. [152]

Let judgment be entered accordingly.

Dated this 7 day of Aug. 1923.

BOURQUIN,
District Judge. [153]

Exhibit "A."

INTERSTATE COMMERCE COMMISSION.
ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 14th day of October, A. D. 1910. Present: MARTIN A. KNAPP, JUDSON C. CLEMENTS, CHARLES A. PROUTY, FRANCIS M. COCKRELL, FRANKLIN K. LANE, EDGAR E. CLARK, JAMES S. HARLAN, Commissioners.

IN THE MATTER OF APPLICATION FOR RELIEF UNDER THE FOURTH SECTION OF THE ACT TO REGULATE COMMERCE, AS AMENDED JUNE 18, 1910.

A public hearing having been had, and it appearing that changes in rates and fares occurring in the ordinary course of business should be possible, pending the time when formal applications to be relieved from the requirements of section 4 of the act to regulate commerce are to be filed by the carrier subject to that act:

IT IS ORDERED: That until February 17, 1911, said carriers may file with the Commission, in manner and form as prescribed by law and by the Commission's regulations, such changes in rates and fares as would occur in the ordinary course of their business, continuing, under the

present rate bases or adjustments, higher rates or fares at intermediate points, and through rates or fares higher than the combination of the intermediate rates or fares, provided that in so doing the discrimination against intermediate points is not made greater than that in existence on August 17, 1910, except when a longer line or route reduces rates or fares to the more distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the short line. The Commission does not hereby approve any rates or fares that may be filed under this permission, all such rates and fares being subject to complaint, investigation, and correction if they conflict [154] with any other provisions of the act.

IT IS FURTHER ORDERED, That such of said carriers as desire to be relieved from any of the requirements of section 4 of the act shall, on or before February 17, 1911, file with the Commission applications as provided in said section 4 and in form as hereinafter prescribed.

Separate applications shall be made as to freight rates and passenger fares. Separate applications shall also be made for relief under the long-and-short-haul provision and for relief under the prohibition against through rates or fares in excess of the combination of the intermediate rates or fares.

Separate applications should also be made for different situations governed by different rate adjustments or competitive influences.

Such applications must be certified, and where the relief sought is the same for two or more car-

riers in the same territory as to the same traffic application may be made jointly for two or more carriers by a joint agent or attorney, where the rates are contained in a joint tariff a petition from the carrier that issues the tariff, specifying the tariff by I. C. C. number, may be made on behalf of the carriers lawfully parties to the tariff and will be held and considered to be on behalf of all carriers concurring in the tariff.

Application for relief must be made on part of that carrier which actually charges more for the shorter haul than for the longer distance. For example, through rates from C. F. A. territory to the southeast made in combination on the Ohio River crossings. If the roads north of the river do not charge less for a longer distance haul to the river and the roads south of the river do charge more for a shorter haul, the application should be made on behalf of the roads south of the river.

If a joint rate or fare is reasonably less than the combination of the intermediate rates or fares, the carriers accepting divisions of such joint rate or fare will not [155] ordinarily be held to thereby violate the fourth section of the act.

IT IS FURTHER ORDERED, That the Commission reaffirmed its previously expressed view that a through rate or fare that is higher than the combination of the intermediate rates or fares is *prima facie* unreasonable (Rule 56 (b) Tariff Circular 17–A) and will insist upon the application of that principle at the earliest possible date in every in-

stance except possible extreme and very unusual cases.

IT IS FURTHER ORDERED, That applications for relief from the provisions of the fourth section of the act shall be in such of the following forms as meet the conditions as to which such relief is sought:

(a) The —— (name of carrier) ——, through —— (name of officer or agent making application), its —— (Official title) ——, petitions the Interstate Commerce Commission for authority to establish rates for the transportation of —— (name of commodity or description of traffic) —— from —— (name or description of point or points of origin) to —— (name or description of point or points of destination) —— lower than rates concurrently in effect to intermediate points —— (names or description of intermediate points) —— ; the highest charge of such intermediate points to apply at —— (name of intermediate point) ——, and to be not more than —— (cents per 100 pounds, per ton, per car, or per package) —— in excess of the rates to —— (name of more distant point at which lower rate is proposed) ——. This application is based upon the desire of petitioner to meet by direct haul over a longer line or route competitive conditions created at —— (name or description of more distant point or points at which lower rates are proposed) —— by —— (name of railway) ——.

NOTE: The points from and to which the lower rates are desired should be stated specifically [156] whenever practicable. If the

applications applied to a situation in which rates or fares from or to a large number of points are based upon, or bear a fixed relation to, the rate or fare from a basing point to the destination in question, it will be sufficient to so state and to give the highest charge proposed from that basing point and the point at which highest charge will apply. If application refers to a particular commodity as to which it is desired to establish commodity rates from points or production or ports of transshipment, leaving higher class rates to apply from intermediate points, that fact should be stated and the producing points or ports should be named. When it is not practicable to name all the points of origin or destination, and they can be accurately described by well-established and familiar names of traffic territories, such descriptions may be used; for example, "From Atlantic seaboard territory as described in — tariff. I. C. C. No. ——" or "From C. F. A. territory."

(b) Same form as (a) shall be used except that the reason which is relied upon as justifying the application shall be stated to be desire to meet by direct haul lower rates fixed at the more distant point by competition of water carriers, specifying whether the competition is created by regular line or so-called "tramp" vessels, and if the former, the name of the line or lines.

(c) Application shall be made in the same form as (a), except that the reason relied upon in sup-

port of same shall be stated to be a desire to meet competition at the more distant point created by water carriers or shorter-line railroad, and to base the rates at intermediate points upon the rate to the more distant competitive point plus a local or charge back. The application shall also show whether the charge for the back haul is the full local or a proportional or an arbitrary rate.

(d) Application shall be made in general form the same as (a) [157] but shall request authority to charge a higher rate as the through route than the aggregate of the intermediate rates subject to the provisions of the act. Application shall state clearly the reasons in support thereof, and shall specify the extent to which it is desired to make the through rate higher than the aggregate of the intermediate rates.

The same forms, modified as may be necessary, shall be used for applications relative to passenger fares, whenever it is practicable the application, either as to freight rates or passenger fares, should cite by I. C. C. numbers the tariff or tariffs in which appear the rates, continuance of which is desired, whenever it is practicable to confine the application to definite points of origin and destination, or to one or more named commodities, that should be done, and whenever practicable the rates themselves should be stated. Each carrier may file as many applications as are necessary to properly present the several situations as to which it desires relief, and it is desirable that each particular situation be treated by itself.

A true copy:

(Signed) EDW. A. MOSELEY,
Secretary. [158]

Exhibit "B."

PACIFIC FREIGHT TARIFF BUREAU.
San Francisco, Cal., December 10, 1910.

TO THE INTERSTATE COMMERCE COMMISSION,
Washington, D. C.

APPLICATION FOR RELIEF FROM PROVISIONS OF FOURTH SECTION OF AMENDED COMMERCE ACT FOR ACCOUNT OF PACIFIC FREIGHT TARIFF BUREAU JOINT AND PROPORTIONAL FREIGHT TARIFF No. 1. I. C. C. No. 2 OF F. W. GOMPH, AGENT, WHICH IS ON FILE WITH YOUR HONORABLE COMMISSION:

In the name and on behalf of each of the carriers parties to the tariff named above, the undersigned, acting as agent and attorney, or under authority of concurrences on file with the Commission from each of the said carriers, respectfully petitions the Interstate Commerce Commission for authority to continue all rates shown in above-named tariff, from and to points named, LOWER than rates concurrently in effect to intermediate points through which traffic moves, in Canada, and in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Utah and Washington, and

points in states east thereof, including District of Columbia.

This application is based upon the desire of the interested carriers to continue the present method, basis or principle of making rates lower at the more distant points than at the intermediate points; such lower rates being necessary by reason of—competition of various water carriers operating upon the Atlantic and Pacific Oceans; competition of carriers operating on the Atlantic and Pacific Oceans, partly by water and partly by rail; competition of various water carriers operating coastwise on the Pacific Ocean; and of carriers partly by water (operating coastwise on the Pacific Ocean and upon the rivers of California and Oregon) and partly by rail between Pacific Coast ports and points in the interior; rates established via the shorter or more direct routes, and applied via the longer or more circuitous route or routes; competition between carriers [159] or routes subject to the act to regulate commerce; competition between markets of production and distribution.

A further petition is respectfully made asking for authority to waive that portion of the Fourth Section of the amended act, which provides that the through rate shall not exceed the aggregate of the intermediate rates subject to the provisions of the act, or to permit your petitioner to publish in each of its tariffs a clause as follows:

The aggregate of the local rates (class or commodity) to and from any intermediate point, when

less than the through rates (class or commodity) shown in this tariff, will apply as the through rate.

OR

The charges collected for the transportation of a shipment from and to, or between, points named in this tariff and thereby made a part of this tariff, MUST NOT EXCEED what the charges would be by applying thereon the aggregate of the lawful intermediate rates in force via the route over which the shipment moved.

LINE OF A GIVEN RAILROAD, there will be found instances where the aggregate of the intermediate rates will be less than the through rates in that tariff. This condition is almost unavoidable because different bases are used upon different portions of the same line.

F. W. GOMPH,
Agent.

Subscribed and sworn to before me this tenth (10) day of December, 1910.

PEDRO SAIZ,
Notary Public in and for the City and County of San Francisco, State of California.
My commission expires May 26, 1914. [160]

Exhibit "C."

PACIFIC FREIGHT TARIFF BUREAU.

San Francisco, Cal., December 10, 1910.

To the Interstate Commerce Commission,
Washington, D. C.

APPLICATION FOR RELIEF FROM PROVISIONS OF FOURTH SECTION OF AMENDED COMMERCE ACT FOR ACCOUNT OF PACIFIC FREIGHT TARIFF BUREAU AND PROPORTIONAL FREIGHT TARIFF NUMBER 1–A, I. C. C. No. 62 OF F. W. GOMPH, AGENT, WHICH IS ON FILE WITH YOUR HONORABLE COMMISSION.

In the name and on behalf of each of the carriers that are parties to the above-named tariff the undersigned as agent and attorney or under authority of concurrences on file with the Commission from each of said carriers, respectfully petitions the Interstate Commerce Commission for authority to continue all rates shown in the above-named tariffs between San Francisco, Oakland, San Jose, Stockton, Marysville, Los Angeles and other points in California named in said tariff *and* Spokane, Walla Walla, Washington, Pendleton and Baker City, Oregon, and Warden, Osborne, Mullen, Idaho, and other points in Oregon, Washington and Idaho named in said tariff lower than the rates concurrently in effect at intermediate points on the Northern Pacific Railway.

This application is based on the desire of the Northern Pacific Railway to meet by direct haul over a longer line or route, competitive conditions created at Bunn, Burke, Dorn, Gem, Hecla, Larson, Mine, Mullen, Wall and Warden, Idaho by the Oregon Washington Railway and Navigation Co. met by the Northern Pacific via Paradise and St. Regis, Montana, the longer and more circuitous route, but not applicable at intermediate points along that line between Wauser and Larson, Idaho, for the reason that short line competition does not exist at such intermediate points.

It is not practical to state in this petition the [161] rates in detail nor specify the higher charge at intermediate points nor the extent to which rates at the intermediate points exceed the rates at the more distant points named.

F. W. GOMPH,
Agent.

Subscribed and sworn to before me this 10th day of December, 1910.

P. SAIZ,
Notary Public in and for the City and County of San Francisco, State of California. [162]

Exhibit "D."

PACIFIC FREIGHT TARIFF BUREAU.

San Francisco, Cal., February 11, 1911.

PETITION No. 2.

TO THE INTERSTATE COMMERCE COMMISSION,
Washington, D. C.

APPLICATION FOR RELIEF FROM PROVISIONS OF FOURTH SECTION OF AMENDED COMMERCE ACT FOR ACCOUNT OF TARIFF No. 1–A, I. C. C. No. 62 of F. W. GOMPH, AGENT.

In the name and on behalf of each of the carriers parties to the tariff above named, the undersigned, acting as agent and attorney, or under authority of concurrences on file with the Commission from each of the said carriers, respectfully petitions the Interstate Commerce Commission for authority to continue all rates in above-named tariff, between San Francisco, Oakland, San Jose, Stockton, Marysville, Los Angeles, Cal., and other points in California named in said tariff, *and* Pasco, Wash., lower than the rates to points on the Northern Pacific Railway, intermediate to Pasco, Wash.

This application is based upon the desire of the Northern Pacific Railway to meet by direct haul over a longer line or route competitive conditions created at points directly competitive with Pasco, Wash., such as Wallula and Hunts Junction, Wash.,

by the Oregon-Washington Railroad and Navigation Co.

It is not practicable in this petition to state the rates in detail nor to specify the highest charge at intermediate point, nor the extent to which rates at the intermediate points exceed the rates at the more distant points named above.

F. W. GOMPH,
Agent.

Subscribed and sworn to before me this 11th day of February, 1911.

P. SAIZ,
Notary Public in and for the City and County of San Francisco, California.

Service and receipt of a copy of the within findings of fact is hereby admitted this 30th day of June, 1923.

ELMER WESTLAKE,
J. E. LYONS,
Attorneys for Defendants.

[Endorsed]: Filed August 14, 1923. Walter B. Maling, Clerk. [163]

(Title of Court and Cause—No. 16694.)

Judgment on Findings.

This cause having come on regularly for trial upon the 14th day of March, 1923, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed; A. J. Harwood, Esq., appearing as attorney for plaintiff

and Frank B. Austin and Elmer Westlake, Esqrs., appearing as attorneys for defendants and the trial having been proceeded with on the 15th day of March, 1923, and oral and documentary evidence having been introduced on behalf of the respective parties and the cause having been submitted to the Court for consideration and decision; and the Court, after due deliberation having filed its opinion and its findings in writing and order that judgment be entered herein in accordance with said findings:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that Joseph Moyse and A. P. Jacobs, copartners doing business under the firm name and style of Jacobs, Malcolm & Burtt, plaintiffs, do have and recover of and from Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, defendants, the sum of two thousand six hundred ninety-six and 32/100 ($2,696.32) dollars, together with $500.00 as attorney's fees and for costs herein expended taxed at $25.00.

Judgment entered August 14, 1923.

WALTER B. MALING,
Clerk. [164]

(Title of Court and Cause—No. 16694.)

Stipulation and Order Extending Time to and Including September 27, 1923, to File Bill of Exceptions.

It is hereby stipulated that the defendants have until and including September 27th, 1923, in which

to prepare and serve on the plaintiffs a draft of the proposed bill of exceptions in the above-entitled action.

A. J. HARWOOD,
Attorney for Plaintiffs.
HENLEY C. BOOTH,
ELMER WESTLAKE,
JAS. E. LYONS,
Attorneys for Defendants.

So ordered.

PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Sep. 18, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [165]

(Title of Court and Cause—No. 16694.)

Stipulation and Order Extending Time to and Including October 15, 1923, to File Bill of Exceptions.

It is hereby stipulated that the defendants have until and including October 15, 1923, in which to prepare and serve on the plaintiffs a draft of the proposed bill of exceptions in the above-entitled action.

A. J. HARWOOD,
Attorney for Plaintiffs.
HENLEY C. BOOTH,
ELMER WESTLAKE,
JAS. E. LYONS,
Attorneys for Defendants.

So ordered.

PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Sep. 27, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [166]

(Title of Court and Cause—No. 16694.)

Stipulation and Order Extending Time to and Including October 25, 1923, to File Bill of Exceptions.

It is hereby stipulated that the defendants have until and including October 25, 1923, in which to prepare and serve on the plaintiffs a draft of the proposed bill of exceptions in the above-entitled action.

A. J. HARWOOD,
Attorney for Plaintiffs.
HENLEY C. BOOTH,
ELMER WESTLAKE,
JAS. E. LYONS,
Attorneys for Defendants.

So ordered.

PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Oct. 11, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [167]

(Title of Court and Cause—No. 16694.)

Stipulation and Order Extending Time to and Including November 10, 1923, to File Bill of Exceptions.

It is hereby stipulated that the defendants have until and including November 10, 1923, in which to prepare and serve on the plaintiffs a draft of the proposed bill of exceptions in the above-entitled action.

A. J. HARWOOD,
Attorney for Plaintiffs.
HENLEY C. BOOTH,
ELMER WESTLAKE,
JAS. E. LYONS,
Attorneys for Defendants.

So ordered.

PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Oct. 24, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [168]

(Title of Court and Causes—No. 16694, No. 16741 and No. 16746.)

Stipulation and Order Extending Time to and Including November 20, 1923, to File Bill of Exceptions.

IT IS HEREBY AGREED that the defendants in the above-entitled actions be and they are hereby

granted until and including November 20, 1923, in which to prepare, serve and deliver to the Clerk for the Judge the bill of exceptions proposed by said defendants in said cases.

Dated: November 7, 1923.

A. J. HARWOOD,
Attorney for Each of the Plaintiffs Above Named.

J. E. LYONS,
ELMER WESTLAKE,
Attorneys for Defendants Above Named.

So ordered.

PARTRIDGE,
Judge.

[Endorsed]: Filed Nov. 8, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [169]

(Title of Court and Cause—No. 16694.)

Petition for Writ of Error.

To the Honorable JOHN S. PARTRIDGE, Presiding Judge of the Above-entitled Court, and to the Judge or Judges of said District Court:

Now come the above-named defendants, Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, by Henley C. Booth, Elmer Westlake and James E. Lyons, their attorneys, and say:

That on the 14th day of August, 1923, this Court entered a judgment herein, in favor of plaintiffs and against defendants, in which judgment and

proceedings prior thereunto in this cause certain errors were committed to the prejudice of these defendants, all of which will more in detail appear from the assignment of errors, which is filed with this petition;

WHEREFORE, defendants pray that a writ of error may issue in their behalf to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the United States [170] Circuit Court of Appeals for the Ninth Circuit.

Dated at San Francisco, Cal., this 14th day of December, 1923.

HENLEY C. BOOTH,
ELMER WESTLAKE,
JAMES E. LYONS,
Attorneys for Defendants.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [171]

(Title of Court and Cause—No. 16,694.)

Assignment of Errors.

Now come the Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, the defendants in the above numbered and entitled cause, and in connection with their petition for a writ of error herein, assign the following errors, which they aver were committed by

the Court upon the trial of this case and in the rendition of the judgment against the said defendants appearing upon the record herein, to wit:

(1) The Court erred in overruling and in not sustaining the defendants' demurrer to the original complaint filed in this cause, and in holding that plaintiffs were not bound to first seek relief from the Interstate Commerce Commission before applying to the District Court.

(2) The court erred in overruling the defendants' motion for a nonsuit.

(3) The Court erred in holding and finding that plaintiffs "are entitled to recover the difference between said alleged overcharge and the charge then made by defendant, Northern Pacific Railway Company, for the haul from said stations respectively to said [172] main line; that the amount of the overcharge on shipments from said stations is as follows: In shipments from Moxee in Car Number CBQ 38610, the amount of the overcharge was and is the sum of $26.14 instead of the sum of $39.20 as stated in the complaint. In the case of the shipment from Yethanot in Car No. NP 96773, the amount of the overcharge was and is the sum of $26.00 instead of $39.00 as stated in the complaint. In the shipment from Farron in Car No. NP 38575, the amount of the overcharge was and is the sum of $40.67 instead of the sum of $60.25 as stated in the complaint. In the shipment from Harrah in Car No. NYC 155897 the amount of the overcharge was and is the sum of $50.44 instead of $74.71 as stated in the complaint. In the shipment

from Ashue in Car No. PRR 104599, the amount of the overcharge was and is the sum of $50.69 instead of the sum of $76.02 as stated in the complaint. In the shipment from Cowiche in Car No. Sou–343012 the amount of the overcharge was and is the sum of $47.15 instead of the sum of $70.71 as stated in the complaint. In the shipment from Harrah in Car No. Erie 61425, the amount of the overcharge was and is the sum of $48.60 instead of the sum of $72.00 as stated in the complaint."

(4) The Court erred in holding and finding that for all practical rate-making purposes the stations of Yethanot, Moxee, Farron, Harrah, Ashue and Cowiche are intermediate between Kennewick and Portland, and also between Kennewick and the stations of delivery mentioned in the complaint.

(5) The Court erred in holding and finding: "That plaintiffs and their assignors have been damaged by the payment of the freight charges mentioned in the complaint; that with the exception of the causes of action which are barred as found in finding of fact XI, the plaintiffs and their assignors have been damaged by the amount of the overcharges as hereinabove found, plus the interest on each overcharge at the rate of seven per cent (7%) per annum, from the date of the payment thereof to the date of judgment herein." [173]

(6) The Court erred in holding and deciding that: "Whether or not defendants' application to be relieved from Section 4 was in proper form and time, it affords no protection in respect to the violation of Section 4 involved in the charge herein.

These violations were by reason of rates initiated subsequent to the amendment of 1910, and so not within the latter's continuance of rates 'lawfully existing at the time of the passage of this act' until applications made to continue them were by the Commission determined. They were only within that provision of Section 4 which provided that application for relief could be made and granted 'in special cases after investigation.' That is, rates to be thus granted or authorized, but which could not be legally charged until thus granted or authorized."

(7) The Court erred in holding and deciding that the defendants' application to be relieved from the provisions of the 4th Section of the Interstate Commerce Act introduced in evidence herein afforded no protection in respect to the alleged violations of Section 4 of said act, involved in the complaint herein.

(8) The Court erred in holding and deciding that the 4th Section Orders of the Interstate Commerce Commission introduced in evidence herein, were made without authority and are void in so far as they authorize the alleged departure from the provisions of the 4th Section of the Interstate Commerce Act, complained of in this action.

(9) The Court erred in finding and holding that plaintiffs are entitled to judgment for the sum of Five Hundred (500) Dollars or any sum as attorneys' and counsel fees herein.

(10) The Court erred in holding and deciding that the separate defenses pleaded in the defend-

ants' answer to the complaint and the amendments thereto and in the amendments made to conform to the proof do not constitute a full and complete defense to this action. [174]

(11) The Court erred in not rendering judgment on its findings in favor of defendants and against the plaintiffs.

WHEREFORE, the said defendants pray that the judgment of the District Court may be reversed.

Dated: San Francisco, Cal., this 14th day of December, 1923.

HENLEY C. BOOTH,
ELMER WESTLAKE,
JAMES E. LYONS,
Attorneys for Defendants.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [175]

(Title of Court and Cause—No. 16,694.)

Order Allowing Writ of Error.

On this 2d day of January, 1924, came the above-named Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, the defendants herein, by Henley C. Booth, Elmer Westlake and James E. Lyons, their attorneys, and filed herein and presented to this Court, their petition praying for the allowance of a writ of error and the assignment of errors intended to be urged by them, praying also that a transcript of the record, proceedings and papers

upon which the judgment herein was rendered duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

And the said parties having filed herein a stipulation in writing waiving bond for costs and a supersedeas bond,—

On consideration whereof, this Court does hereby allow the writ of error and orders that said writ of error issued without requiring the filing of any bond.

Dated: San Francisco, Cal., this 2d day of January, 1924.

FRANK H. RUDKIN,
United States Circuit Judge.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [176]

(Title of Court and Cause—No. 16,694.)

Stipulation and Order Waiving Bonds on Allowance of Writ of Error.

IT IS HEREBY STIPULATED that a writ of error may be allowed and granted upon defendants' petition therefor without the filing of any supersedeas bond or bond for costs, and that supersedeas and costs bond is hereby waived.

Dated: San Francisco, Cal., this 14th day of December, 1923.

ALFRED J. HARWOOD,
Attorney for Plaintiff.
HENLEY C. BOOTH,
ELMER WESTLAKE,
JAMES E. LYONS,
Attorneys for Defendants.

So ordered.

FRANK H. RUDKIN,
United States Circuit Judge.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [177]

(Title of Court and Cause—No. 16,694.)

Praecipe for Transcript of Record.

To the Honorable WALTER B. MALING, Clerk of the Above-entitled Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to a writ of error allowed in the above-entitled cause, and to include in such transcript the following papers, to wit:

1. Complaint.
2. Answer of defendants.
3. Trial stipulation, filed March 12, 1923.
4. Minute order, March 12, 1923, allowing amendment to answer.
5. Amendment to answer.

6. Minute order, March 12, 1923, denying defendants' motion for nonsuit.
7. Findings of fact and conclusions of law.
8. Judgment order.
9. All stipulations and orders extending time to serve and tender defendants' bill of exceptions.
10. Stipulation and order waiving bonds on allowance of writ of error.
11. Petition for writ of error.
12. Assignment of errors.
13. Order allowing writ of error.
14. Writ of error.
15. Citation on writ of error.
16. This praecipe.
17. Clerk's certificate to transcript.

Please consolidate the transcript in this case with that in suits Nos. 16,741 and 16,746.

Dated: At San Francisco, California, this 3d day of January, 1924.

HENLEY C. BOOTH,
ELMER WESTLAKE,
JAMES E. LYONS,
Attorneys for Defendants.

[Endorsed]: Filed Jan. 14, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [178]

(Title of Court and Cause—No. 16,746—At Law.)

Complaint.

Now comes A. W. Knox of the city and county of San Francisco, State of California, in the South-

ern Division of the Northern District of California, and complains of the defendants, Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, and for cause of action allege:

I.

That at all times herein mentioned plaintiff was, and now is a citizen and resident of the city and county of San Francisco in the Northern District of California.

II.

That the defendant Northern Pacific Railway Company is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Minnesota; that the defendant Southern Pacific Company is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky; that at all times herein mentioned each of said defendants was and now is a common carrier engaged in the transportation of passengers and property wholly by railroad from one state or territory of the United States to other states and territories thereof; that each of said defendants is, and at all times herein mentioned was, subject to the provisions of the Act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce," as amended. [179]

III.

That said defendant Northern Pacific Railway Company operates and at all times herein mentioned operated a railroad from the station of

Kennewick, in the State of Washington, to the city of Portland, in the State of Oregon. That said defendant Southern Pacific Company operates and at all times herein mentioned operated a railroad from said city of Portland to Sacramento, Stockton, Oroville, Woodland, Yuba, Lodi, Colusa, Chico, Modesto, Suisun, Roseville, Willows, Turlock, Martinez, Oakland, and San Francisco, in the State of California (hereinafter called said points of delivery). That said railroad, from the said station of Kennewick to the said city of Portland, passes through the stations of Grandview, Toppenish, Outlook, Mabton, Nass, Sunnyside, Parker, Midvale, Phillips, Wapato, Ashue, Satus, Harrah, Cowich, Yakima and Selah, which said stations are hereinafter called said intermediate stations. That all of said intermediate stations are in the State of Washington.

IV.

That prior to the year 1917, said defendants established a through route and joint rate on potatoes from said station of Kennewick to said points of delivery, which said through route and joint rate so established by defendants was in effect during and at the times that all the shipments described in paragraph V of this complaint moved. That said through route from said station of Kennewick to said points of delivery passes through said intermediate stations. That said railroad and said joint route from said station of Kennewick to said points of delivery passes through said intermediate stations. That it is a less distance from said inter-

mediate stations, and each of them, to said points of delivery than it is from said station of Kennewick to said points of delivery. That it is a longer distance from said station of Kennewick over the same line and route in the same [180] direction to said points of delivery than it is from said intermediate stations to said points of delivery, the shorter being included within the longer distance.

V.

That between the 10th day of March, 1920, and the 19th day of March, 1922, viz., on the dates hereinafter stated in this paragraph of this complaint, Walter A. Perry Company caused to be shipped and transported over the said lines and route of the defendants, Northern Pacific Railway Company and Southern Pacific Company, from said intermediate stations to said points of delivery, ninety-seven carloads of potatoes; that said ninety-seven carloads of potatoes were all transported from said intermediate stations to the said points of delivery.

That upon the arrival of said shipments at said points of delivery, the defendants demanded that said Walter A. Perry Company pay for the transportation thereof charges in excess of the charges then made by defendants for the transportation of the same quantity and of like kind of property for a longer distance over the same line in the same direction, the shorter being included within the longer distance; that is to say, the defendants demanded that said Walter A. Perry Company pay for the transportation of said potatoes charges greater than said defendants then charged for the

transportation of potatoes from the said station of Kennewick to the said points of delivery. That said Walter A. Perry Company thereupon paid said charges so demanded by defendants, which said charges so paid by said Walter A. Perry Company were greater than the compensation then charged by defendants for the transportation of all like kind of property for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

That the following statement shows the date of shipment of each carload, the number of the car in which it was shipped, the station from which the shipment was made, the place of destination of each shipment, the amount of the charges paid by said Walter A. Perry Company for the transportation thereof, the date that said charges were paid, and the amount of which the [181] charges so paid exceeding the charges then made for the transportation of the same quantity of like kind of property for the greater distance, as aforesaid, which said last-mentioned amount appears under the head "overcharge" in the following statement:

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
3/11/20	NYC—153208	Grandview	Sacramento	$186.35	4/21/20	$43.71
3/5/21	ICC–56782	Toppenish	Sacramento	$251.90	3/19/21	$59.39
3/17/21	NP–98132	Outlook	Oroville	$266.40	4/1/21	$63.00
3/14/21	DH–16847	Mabton	Sacramento	$232.22	3/28/21	$54.75
3/16/21	NP–95371	Toppenish	Sacramento	$242.79	5/24/21	$61.25
4/6/21	NP–95465	Nass	Sacramento	$185.62	4/22/21	$43.77
4/26/21	NP–98129	Grandview	Sacramento	$205.78	4/26/21	$48.52
5/2/21	BNP–98867	Nass	Sacramento	$184.50	6/8/21	$43.50
9/20/21	B&O–14540	Toppenish	Sacramento	$203.31	10/15/21	$61.75
9/26/21	NP–94603	Sunnyside	Sacramento	$202.21	10/13/21	$57.67
9/29/21	DLW–6329	Grandview	Woodland	$217.49	11/8/21	$44.13
9/29/21	NP–94952	Sunnyside	Yuba	$270.97	10/7/21	$87.42
9/29/21	NP–97476	Grandview	Oroville	$240.31	10/29/31	$61.66
9/29/21	RD–3853	Sunnyside	Lodi	$225.43	10/4/21	$58.58
9/30/21	FGE–28179	Sunnyside	Sacramento	$212.79	10/12/21	$50.17
9/30/21	RI–66099	Sunnyside	Colusa	$221.35	10/29/21	$44.35
10/5/21	NP–94477	Parker	Oroville	$270.17	10/29/21	$63.89

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
10/5/21	NP–94729	Toppenish	Yuba	$246.74	10/20/21	$51.85
10/10/21	L&N–15838	Midvale	Chico	$243.64	11/25/21	$50.71
10/15/21	NP–94729	Toppenish	Yuba	$246.74	10/20/21	$51.85
10/17/21	SP–33788	Sunnyside	Colusa	$242.05	11/21/21	$50.87
10/18/21	NP–28648	Phillips	Sacramento	$220.03	11/2/21	$54.00
10/19/21	NP–24221	Mabton	Sacramento	$219.43	10/31/21	$51.74
10/21/19	NP–29616	Toppenish	Oroville	$307.91	11/4/21	$72.81
10/21/21	NP–19617	Parker	Modesto	$259.58	11/16/21	$52.57
10/21/21	L&N–102181	Toppenish	Lodi	$206.03	11/5/21	$48.58
10/21/21	NP–48751	Phillips	Suisun	$206.04	12/2/21	$49.12
10/23/21	NP–34713	Phillips	Sacramento	$218.44	11/3/21	$51.50
10/23/21	NP–26082	Phillips	Sacramento	$238.49	11/10/21	$56.22
10/24/21	NP–48537	Sunnyside	Chico	$240.67	11/25/21	$50.57
10/27/21	Penn–100796	Phillips	Yuba	$240.08	1/6/22	$50.61
10/28/21	Penn–105006	Toppenish	Sacramento	$240.83	11/8/21	$56.78
10/28/21	GN–10671	Toppenish	Woodland	$237.34	11/7/21	$39.56
10/28/21	NP–49230	Wapato	Roseville	$257.34	11/5/21	$86.99

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
10/31/21	Milw–8374	Grandview	Oroville	$254.41	11/16/21	$60.16
11/2/21	CNWO–14484	Toppenish	Colusa	$276.00	11/19/21	$58.00
11/2/21	NYC–156288	Mabton	Sacramento	$237.49	11/12/21	$67.71
11/2/21	Penn–104070	Sunnyside	Sacramento	$312.04	11/18/21	$81.08
11/4/21	NP–96724	Wapato	Woodland	$276.54	11/4/21	$48.19
11/5/21	NYC–154424	Wapato	Oroville	$295.41	11/5/21	$69.86
11/7/21	CNJ–9180	Ashue	Sacramento	$254.03	11/31/21	$74.49
11/7/21	NYC–15588	Parker	Sacramento	$233.17	11/19/21	$60.59
11/10/21	NYC–138728	Toppenish	Roseville	$298.22	11/19/21	$116.19
11/14/21	NP–97107	Wapato	Chico	$315.05	11/25/21	$66.20
11/17/21	RI–66069	Ashue	Sacramento	$291.80	12/27/21	$85.56
11/19/21	PFE–16260	Toppenish	Colusa	$248.92	12/12/21	$52.31
11/21/21	NP–96891	Satus	Sacramento	$222.75	12/5/21	$52.52
11/27/21	Penn–100796	Sunnyside	Yuba	$240.08	12/9/21	$49.84
11/29/21	NP–97408	Mabton	Yuba	$255.99	12/11/21	$70.49
12/7/21	Penn–102135	Sunnyside	Chico	$259.30	1/24/22	$54.49
12/8/21	B&O–1551	Outlook	Sacramento	$222.75	12/21/21	$52.52

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
12/8/21	NYC–145023	Sunnyside	Chico	$254.75	12/19/21	$53.54
[182]						
12/8/21	IC–58451	Sunnyside	Sacramento	$263.40	12/22/21	$62.10
12/9/21	CBQ–38421	Wapato	Roseville	$259.51	12/22/21	$82.75
12/12/21	NP–97470	Wapato	Yuba	$262.30	12/22/22	$55.12
12/13/21	NP–96370	Toppenish	Willows	$275.61	12/23/21	$40.86
12/14/21	NP–94437	Toppenish	Colusa	$248.75	1/14/22	$52.28
12/15/21	NP–96159	Toppenish	Chico	$248.98	1/24/22	$52.32
12/16/21	NYC–144457	Toppenish	Oroville	$268.32	12/29/21	$70.70
12/16/21	NH–22079	Grandview	Yuba	$256.54	1/6/22	$53.91
12/17/21	RD–11691	Toppenish	Sacramento	$221.58	12/29/21	$49.24
12/29/21	NP–97088	Toppenish	Sacramento	$244.16	1/13/22	$57.57
1/4/22	NP–96689	Toppenish	Sacramento	$201.40	1/14/22	$47.18
1/3/22	NP–05291	Toppenish	Sacramento	$200.57	1/13/22	$45.88
1/4/22	NP–94406	Toppenish	Chico	$226.87	1/27/22	$47.18
1/5/22	NP–98129	Toppenish	Roseville	$225.48	1/16/22	$72.16
1/6/22	NP–94775	Toppenish	Oroville	$240.54	1/20/22	$56.12

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
1/6/22	NP–96387	Toppenish	Woodland	$214.41	2/7/22	$36.03
1/6/22	NP–96677	Toppenish	Sacramento	$204.60	1/23/22	$47.93
1/7/22	NP–94783	Toppenish	Suisun	$201.85	2/2/22	$47.28
1/7/22	NP–95078	Toppenish	Roseville	$225.61	1/16/22	$72.20
1/9/22	NP–98289	Toppenish	Colusa	$226.07	2/22/22	$47.02
1/10/22	RD–4271	Toppenish	Yuba	$227.68	2/9/22	$47.35
1/10/22	NP–98787	Toppenish	Sacramento	$200.33	2/2/22	$46.92
1/21/22	CBQ–38470	Grandview	Sacramento	$205.82	2/11/22	$48.15
1/26/22	NP–98645	Grandview	Turlock	$231.50	1/26/22	$43.60
1/27/22	NP–98197	Grandview	Oroville	$248.91	2/14/22	$64.45
1/27/22	NP–97284	Grandview	Sacramento	$205.40	2/11/22	$48.11
1/28/22	NP–98497	Grandview	Chico	$235.48	2/27/22	$47.48
1/28/22	CBQ–38403	Grandview	Martinez	$205.35	2/23/22	$40.28
1/28/22	NP–96654	Grandview	Sacramento	$221.39	2/7/22	$51.84
2/17/22	NP–97056	Toppenish	Sacramento	$200.01	2/17/22	$46.55
9/24/21	NP–98678	Harrah	Roseville	$248.61	10/5/21	$92.77
11/25/21	NP–96854	Cowick	Sacramento	$239.46	3/11/22	$70.25

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
12/8/21	NP–98556	Wapato	Sacramento	$249.72	12/22/21	$48.90
1/11/22	NP–97669	Toppenish	San Francisco	$201.07	1/27/22	$47.10
1/23/22	NP–97051	Toppenish	San Francisco	$200.23	2/4/22	$46.83
1/23/22	NP–96238	Toppenish	San Francisco	$200.30	2/4/22	$46.90
1/24/22	NP–97983	Toppenish	San Francisco	$217.48	2/11/22	$50.88
1/25/22	NP–98654	Toppenish	San Francisco	$229.80	2/8/22	$53.90
1/26/22	NP–96275	Toppenish	San Francisco	$202.71	2/9/22	$47.48
1/27/22	NP–98873	Toppenish	Oakland	$220.03	2/9/22	$66.70
1/31/22	NP–98864	Toppenish	San Francisco	$225.06	2/13/22	$52.72
3/7/21	RD–8605	Mabton	Sacramento	$205.13	3/17/22	$48.05
3/14/22	NP–94837	Toppenish	Woodland	$194.35	3/25/22	$41.35
3/16/22	NP–95072	Toppenish	Sacramento	$203.02	3/29/22	$47.56
3/18/22	NP–98019	Yakima	Sacramento	$223.88	4/3/22	$66.63

That the figures in the column headed "Date of Shipment" and in the column headed "Date of Payment" shows the months of the year and the second figure the day of the month and the third figure the year of the twentieth century.

VI.

That neither of said defendants ever applied to the Interstate Commerce Commission for authority to charge less from said station of Kennewick to said points of delivery than from said intermediate stations to said points of delivery. That a lower rate or compensation for the haul from said station of Kennewick to said points of delivery did not exist on the 18th day of June, 1910, the time of the passage of the Act of Congress of June 18, 1910, amendatory to said Act of Congress of February 4, 1887. [183] That the Interstate Commerce Commission never authorized said defendants, or either of them, to charge less from Kennewick to said points of delivery than from said intermediate stations to said points of delivery than from said intermediate stations to said points of delivery.

VII.

That at all times herein mentioned said Walter A. Perry Company was, and now is, a copartnership and firm the copartners and members of which are, and at all times herein mentioned were, Walter A. Perry, A. H. Willi and B. K. Young; that each of said persons is, and at all times herein mentioned was, a citizen and resident of the State of California; that prior to the commencement of this action said Walter A. Perry Company assigned, trans-

ferred and set over unto plaintiff all claims and demands of said Walter A. Perry Company against Northern Pacific Railway Company and Southern Pacific Company for the recovery of said overcharges and excessive charges paid by said Walter A. Perry Company to said defendants or either of them, and also all claims and demands of said Walter A. Perry Company against said defendants or either of them, for damages on account of the exaction on payment of said excessive charges.

VIII.

That neither nor any of said defendants has paid to plaintiff or to said Walter A. Perry Company the amount of said overcharges, or any part thereof, or any interest thereon.

IX.

That prior to the commencement of this action said Walter A. Perry Company, filed with the clerk of the county in which the principal place of business of said copartnership is situated a certificate stating the names in full of all of the members of said partnership, and their places of residence. That prior to the commencement of this action said certificate was published once a week for four successive weeks in a newspaper published in said county. That said certificate [184] so filed and published, as aforesaid, was signed by said partners and acknowledged before an officer authorized to take the acknowledgment of conveyances of real property.

For a further and additional cause of action against said defendants plaintiff alleges:

I.

That at all times herein mentioned plaintiff was, and now is a citizen and resident of the city and county of San Francisco in the Northern District of California.

II.

That the defendant Northern Pacific Railway Company is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Minnesota; that the defendant Southern Pacific Company is, and at all times herein mentioned was, a corporation organnized and existing under and by virtue of the laws of the State of Kentucky; that at all times herein mentioned each of said defendants was and now is a common carrier engaged in the transportation of passengers and property wholly by railroad from one State or Territory of the United States to other States and Territories thereof; that each of said defendants is, and at all times herein mentioned was, subject to the provisions of the Act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce," as amended.

III.

That said defendant Northern Pacific Railway Company operates and at all times herein mentioned operated a railroad from the station of Kennewick, in the State of Washington, to the city of Portland, in the State of Oregon. That said defendants Southern Pacific Company operates and at all times herein mentioned operated a railroad from said city of Portland to Sacramento, Stockton, and San

Francisco, in the State of California (hereinafter called said points of delivery). That said railroad from the said station of Kennewick to the said city of Portland, passes through [185] the stations of Toppenish and Sunnyside, which said stations are hereinafter called said intermediate stations. That all of said intermediate stations are in the State of Washington.

IV.

That prior to the year 1917, said defendants established a through route and joint rate on potatoes from said station of Kennewick to said points of delivery, which said through route and joint rate so established by defendants was in effect during and at the times that all the shipments described in paragraph V of this complaint moved. That said through route from said station of Kennewick to said points of delivery passes through said intermediate stations. That said railroad and said joint route from said station of Kennewick to said points of delivery passes through said intermediate stations. That it is a less distance from said intermediate stations, and each of them, to said points of delivery than it is from said station of Kennewick to said points of delivery. That it is a longer distance from said station of Kennewick over the same line and route in the same direction to said points of delivery than it is from said intermediate stations to said points of delivery, the shorter being included within the longer distance.

V.

That between the 10th day of January, 1921, and

the 3d day of November, viz., 1921, on the dates hereinafter stated in this paragraph of this complaint, John Demartini Company, a corporation, caused to be shipped and transported over the said lines and route of the defendants, Northern Pacific Railway Company and Southern Pacific Company, from said intermediate stations to said points of delivery, five carloads of potatoes; that said five carloads of potatoes were all transported from said intermediate stations to the said points of delivery. [186]

That upon the arrival of said shipments at said points of delivery, the defendants demanded that said John Demartini Company pay for the transportation thereof charges in excess of the charges then made by defendants for the transportation of the same quantity and of like kind of property for a longer distance over the same line in the same direction, the shorter being included within the longer distance; that is to say, the defendants demanded that said John Demartini Company pay for the transportation of said potatoes charges greater than said defendants then charged for the transportation of potatoes from the said station of Kennewick to the said points of delivery. That said John Demartini Company thereupon paid said charges so demanded by defendants, which said charges so paid by said John Demartini Company were greater than the compensation then charged by defendants for the transportation of like kind of property for a longer distance over the same line or route in the same

direction, the shorter being included within the longer distance.

That the following statement shows the date of shipment of each carload, the number of the car in which it was shipped, the station from which the shipment was made, the place of destination of each shipment, the amount of the charges paid by said John Demartini Company for the transportation thereof, the date that said charges were paid, and the amount by which the charges so paid exceeded the charges then made for the transportation of the same quantity of like kind of property for the greater distance, as aforesaid, which said last-mentioned amount appears under the head "Overcharge" in the following statement: [187]

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
11/ 2/21	NP–37583	Toppenish	Stockton	$232.91	11/20/21	$60.05
10/13/21	NP–37500	Toppenish	Sacramento	$226.50	11/30/21	$56.18
10/23/21	NP–97703	Toppenish	San Francisco	$184.53	11/ 7/21	$43.51
1/11/21	NP–37524	Toppenish	San Francisco	$196.68	10/29/21	$46.38
9/28/21	NP–97262	Sunnyside	San Francisco	$220.11	10/14/21	$51.90

That the first figure in the column headed "Date of Shipment" and in the column headed "Date of Payment" shows the months of the year and the second figure the day of the month and the third figure the year of the twentieth century.

VI.

That neither of said defendants ever applied to the Interstate Commerce Commission for authority to charge less from said station of Kennewick to said points of delivery than from said intermediate stations to said points of delivery. That a lower rate or compensation for the raul from said station of Kennewick to said points of delivery did not exist on the 18th day of June, 1910, the time of the passage of the Act of Congress of June 18, 1910, amendatory to said Act of Congress of February 4, 1887. That the Interstate Commerce Commission never authorized said defendants, or either of them, to charge less from Kennewick to said points of delivery than from said intermediate stations to said points of delivery.

VII.

That at all times herein mentioned said John Demartini Company was, and now is, a corporation organized and existing under the laws of the State of California.

That prior to the commencement of this action said John Demartini Company assigned, transferred and set over unto plaintiff all claims and demands of said John Demartini Company against Northern Pacific Railway Company and Southern Pacific Company for the recovery of said overcharges and excessive

charges paid by said John Demartini Company to said defendants or either of them, and also all claims and demands of said John Demartini Company against said defendants, or either of them, for damages on account of the exaction on payment of said excessive charges.

For a further and additional cause of action against said defendants plaintiff alleges:

I.

That at all times herein mentioned plaintiff was, and now is, [188] a citizen and resident of the city and county of San Francisco in the Northern District of California.

II.

That the defendant Northern Pacific Railway Company is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Minnesota; that the defendant Southern Pacific Company is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky; that at all times herein mentioned each of said defendants was and now is a common carrier engaged in the transportation of passengers and property wholly by railroad from one state or territory of the United States to other states and territories thereof; that each of said defendant is, and at all times herein mentioned was, subject to the provisions of the Act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce," as amended.

III.

That said defendant Northern Pacific Railway Company operates, and at all times herein mentioned operated, a railroad from the station of Kennewick, in the State of Washington, to the city of Portland, in the State of Oregon. That said defendant Southern Pacific Company operates, and at all times herein mentioned operated, a railroad from said city of Portland to San Francisco and Oakland in the State of California (hereinafter called said points of delivery). That said railroad, from the said station of Kennewick to the said city of Portland, passes through the stations of Ashue, Toppenish, Wapato and Grandview, which said stations are hereinafter called said intermediate stations. That all of said intermediate stations are in the State of Washington.

IV.

That prior to the year 1917, said defendants established a through route and joint rate on potatoes from said station of Kennewick to said points of delivery, which said through [189] route and joint rate so established by defendants was in effect during and at the times that all the shipments described in paragraph V of this complaint moved. That said through route from said station of Kennewick to said points of delivery passes through said intermediate stations. That said railroad and said joint route from said station of Kennewick to said points of delivery passes through said intermediate stations. That it is a less distance from said intermediate stations, and each of them, to said points of

delivery than it is from said station of Kennewick to said points of delivery. That it is a longer distance from said station of Kennewick over the same line and route in the same direction to said points of delivery than it is from said intermediate stations to said points of delivery, the shorter being included within the longer distance.

V.

That between the 2d day of November, 1921, and the 24th day of February, 1922, viz., on the dates hereinafter stated in this paragraph of this complaint, L. Scatena & Company—A. Galli Fruit Company, consolidated, a corporation (hereinafter called said shipper) caused to be shipped and transported over the said lines and route of the defendants, Northern Pacific Railway Company and Southern Pacific Company, from said intermediate stations to said points of delivery, fourteen carloads of potatoes; that said fourteen carloads of potatoes were all transported from said intermediate stations to the said points of delivery.

That upon the arrival of said shipments at said points of delivery, the defendants demanded that said shipper pay for the transportation thereof charges in excess of the charges then made by defendants for the transportation of the same quantity and of like kind of property for a longer distance over the same line in the same direction, the shorter being included within the longer distance; that is to say, the defendants [190] demanded that said shipper pay for the transportation of said potatoes charges greater than said defendants then charged

for the transportation of potatoes from the said station of Kennewick to the said points of delivery. That shipper thereupon paid said charges so demanded by defendants, which said charges so paid by said shipper were greater than the compensation then charged by defendants for the transportation of like kind of property for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

That the following statement shows the date of shipment of each carload, the number of the car in which it was shipped, the station from which the shipment was made, the place of destination of each shipment, the amount of the charges paid by said shipper for the transportation thereof, the date that said charges were paid, and the amount by which the charges so paid exceed the charges them made for the transportation of the same quantity of like kind of property for the greater distance, as aforesaid, which said last mentioned amount appears under the head "Overcharge" in the following statement:

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
11/3/21	B&O–13657	Ashue	San Francisco	$274.31	11/17/21	$80.43
12/14/21	NP–98461	Toppenish	San Francisco	$229.00	1/ 2/22	$54.00
12/10/21	LV–35126	Wapato	San Francisco	$226.60	12/22/21	$53.43
12/12/21	CBQ–38539	Ashue	San Francisco	$268.66	12/29/21	$78.78
12/12/21	NP–96575	Wapato	San Francisco	$224.49	12/29/21	$52.93
12/9/21	NYC–152247	Ashue	San Francisco	$277.47	12/22/21	$81.37
12/9/21	CBQ–38657	Wapato	San Francisco	$221.02	12/23/21	$51.52
12/2/21	CSTPM–8620	Ashue	Oakland	$273.15	1/3/22	$80.10
1/9/22	NP–95427	Toppenish	San Francisco	$203.47	1/21/22	$47.66
1/9/22	NP–97435	Wapato	San Francisco	$199.53	1/21/22	$46.85
1/11/22	NP–97546	Wapato	San Francisco	$210.87	1/25/22	$49.40
1/24/22	NP–95202	Wapato	San Francisco	$233.24	2/6/22	$54.64
2/7/22	NP–97033	Grandview	San Francisco	$207.18	2/6/22	$48.53
1/6/22	NP–96559	Wapato	Oakland	$214.62	2/23/22	$50.27

That the first figure in the column headed "Date of Shipment" and in the column headed "Date of Payment" shows the months of the year and the second figure the day of the month and the third figure the year of the twentieth century.

VI.

That neither of said defendants ever applied to the Interstate [191] Commerce Commission for authority to charge less from said station of Kennewick to said points of delivery than from said intermediate stations to said points of delivery. That a lower rate or compensation for the haul from said station of Kennewick to said points of delivery did not exist on the 18th day of June, 1910, the time of the passage of the Act of Congress of June 18, 1910, amendatory to said Act of Congress of February 4, 1887. That the Interstate Commerce Commission never authorized said defendants, or either of them, to charge less from Kennewick to said points of delivery than from said intermediate stations to said points of delivery.

VII.

That said shipper is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California.

That prior to the commencement of this action said shipper assigned, transferred and set over unto plaintiff all claims and demands of said shipper against Northern Pacific Railway Company and Southern Pacific Company for the recovery of said overcharges and excessive charges paid by said shipper to said defendants or either of them, and

also all claims and demands of said shipper against said defendants or either of them, for damages on account of the exaction on payment of said excessive charges.

For a further and additional cause of action against said defendants plaintiff alleges:

I.

That at all times herein mentioned plaintiff was, and now is, a citizen and resident of the city and county of San Francisco in the Northern District of California.

II.

That the defendant Northern Pacific Railway Company is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Minnesota; that the defendant Southern Pacific Company is, and [192] at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky; that at all times herein mentioned each of said defendants was and now is a common carrier engaged in the transportation of passengers and property wholly by railroad from one state or territory of the United States to other states and territories thereof; that each of said defendants is, and at all times herein mentioned was, subject to the provisions of the Act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce," as amended.

III.

That said defendant Northern Pacific Railway Company operates and at all times herein mentioned

operated a railroad from the station of Kennewick, in the State of Washington, to the city of Portland, in the State of Oregon. That said defendant Southern Pacific Company operates and at all times herein mentioned operated a railroad from said city of Portland to San Francisco in the State of California (hereinafter called said point of delivery). That said railroad, from the said station of Kennewick to the said city of Portland, passes through the stations of Outlook, Sunnyside and Selah, which said stations are hereinafter called said intermediate stations. That all of said intermediate stations are in the State of Washington.

IV.

That prior to the year 1917, said defendants established a through route and joint rate on potatoes from said station of Kennewick to said points of delivery, which said through route and joint rate so established by defendants was in effect during and at the times that all the shipments described in paragraph V of the complaint moved. That said through route from said station of Kennewick to said points of delivery passes through said intermediate stations. That said railroad and said joint route from said station of Kennewick to said points of delivery passes through said intermediate stations. That it is a less distance from said intermediate stations, [193] and each of them, to said points of delivery than it is from said stations of Kennewick to said points of delivery. That it is a longer distance from said

station of Kennewick over the same line and route in the same direction to said points of delivery than it is from said intermediate stations to said points of delivery, the shorter being included within the longer distance.

V.

That between the 14th day of November, 1920, and the 22d day of November, 1921, viz., on the dates hereinafter stated in this paragraph of this complaint F. M. Burnham (hereinafter called said shipper) caused to be shipped and transported over the said lines and route of the defendants, Northern Pacific Railway Company and Southern Pacific Company, from said intermediate stations to said points of delivery, seventeen carloads of potatoes; that said seventeen carloads of potatoes were all transported from said intermediate stations to the said points of delivery.

That upon the arrival of said shipments at said points of delivery, defendants demanded that said shipper pay for the transportation thereof charges in excess of the charges then made by defendants for the transportation of the same quantity and of like kind of property for a longer distance over the same line in the same direction, the shorter being included within the longer distance; that is to say, the defendants demanded that the said shipper pay for the transportation of said potatoes charges greater than said defendants then charged for the transportation of potatoes from the said station of Kennewick to the said points of delivery. That said shipper thereupon paid

said charges so demanded by defendants, which said charges so paid by said shipper were greater than the compensation then charged by defendants for the transportation of like kind of property for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

That the following statement shows the date of shipment [194] of each carload, the number of the car in which it was shipped, the station from which the shipment was made, the place of destination of each shipment, the amount of the charges paid by said shipper for the transportation thereof, the date that said charges were paid, and the amount by which the charges so paid exceeded the charges then made for the transportation of the same quantity of like kind of property for the greater distance, as aforesaid, which said last-mentioned amount appears under the head "Overcharge" in the following statement:

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
11/15/20	NP–95475	Outlook	San Francisco	$260.44	12/ 3/20	$67.67
12/ 3/20	CBQ–38884	Sunnyside	San Francisco	$234.70	12/20/20	$60.99
11/19/20	PFE–143	Sunnyside	San Francisco	$229.18	12/27/20	$54.04
11/16/20	PFE–4119	Sunnyside	San Francisco	$226.72	11/27/20	$53.46
11/ 4/21	PFE–85575	Sunnyside	San Francisco	$225.40	11/17/21	$53.15
6/ 6/21	PFE–13853	Sunnyside	San Francisco	$191.82	6/23/21	$45.23
11/ 4/21	PFE–6720	Sunnyside	San Francisco	$230.44	11/17/21	$54.34
11/15/21	PFE–10413	Sunnyside	San Francisco	$226.14	11/29/21	$53.32
11/21/21	PFE–3954	Sunnyside	San Francisco	$235.48	12/ 5/21	$55.52
6/ 8/21	NP–95563	Selah	San Francisco	$184.50	6/24/21	$43.50
11/17/21	PRR–100772	Sunnyside	San Francisco	$227.30	11/29/21	$53.59
11/ 8/21	NP–98826	Sunnyside	San Francisco	$236.71	11/23/21	$55.81
11/ 5/21	Pa–108790	Outlook	San Francisco	$250.24	11/19/21	$59.00
11/ 4/21	NP–98849	Sunnyside	San Francisco	$243.14	11/17/21	$57.33
10/29/21	OMA–8898	Outlook	San Francisco	$247.54	11/14/21	$58.37
6/ 6/21	PFE–902	Selah	San Francisco	$187.24	6/23/21	$44.15
6/ 4/21	NP–98248	Sunnyside	San Francisco	$201.78	6/23/21	$47.57

That the first figure in the column headed "Date of Shipment" and in the column headed "Date of Payment" shows the months of the year and the second figure the day of the month and the third figure the year of the twentieth century.

VI.

That neither of said defendants ever applied to the Interstate Commerce Commission for authority to charge less from said station of Kennewick to said points of delivery than from said intermediate stations to said points of delivery. That a lower rate or compensation for the haul from said station of Kennewick to said points of delivery did not exist on the 18th day of June 1910, the time of the passage of the Act of Congress of June 19, 1910, amendatory to said Act of Congress of February 4, 1887. That the Interstate Commerce Commission [195] never authorized said defendants or either of them, to charge less from Kennewick to said points of delivery than from said intermediate stations to said points of delivery.

VII.

That said shipper is, and at all times herein was citizen and resident of the city and county of San Francisco in the Northern District of California.

That prior to the commencement of this action said shipper assigned, transferred, and set over unto plaintiff all claims and demands of said shipper against Northern Pacific Railway Company and Southern Pacific Company for the recovery of said overcharges and excessive charges paid by said shipper to said defendants or either of them,

and also all claims and demands of said shipper against said defendants or either of them, for damages on account of the exaction on payment of said excessive charges.

That the amount in controversy in this suit exceeds, exclusive of interest and costs, the sum or value of $3,000, and is between citizens of different states, to wit, between the plaintiff, a citizen and resident of the State of California, and the defendants who are citizens and residents of the States of Minnesota and Kentucky, as hereinabove alleged.

THEREFORE plaintiff prays judgment against defendants for the amount of said overcharges, as alleged in paragraph V of each of said causes of action, to wit, for the sum of $7,155.15, together with interest on each overcharge at the rate of seven per cent per annum from the date of the payment thereof, and for the further sum of $2,000 as attorney's or counsel fees. And the plaintiff also prays judgment for his costs of suit.

ALFRED J. HARWOOD,
Attorney for Plaintiff. [196]

State of California,
City and County of San Francisco,
Northern District of California,—ss.

A. W. Knox, having first duly sworn, deposes and says: That he is the plaintiff above named; that he has read the within and foregoing complaint and knows the contents thereof and that the same is true of his own knowledge.

A. W. KNOX.

Subscribed and sworn to before me this 30th day of June, 1922.

[Seal] E. M. CLARK,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jun. 30, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [197]

(Title of Court and Cause—No. 16746.)

Answer of Defendants, Northern Pacific Railway Company and Southern Pacific Company.

Now come the defendants, Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, and, for answer to the complaint herein, admit, aver and deny as follows, to wit:

Answering the first cause of action therein alleged:

I.

Deny that the line of railroad maintained by defendant, Northern Pacific Railway Company, from the station of Kennewick, in the State of Washington to the city of Portland, in the State of Oregon, passes through the stations of Midvale, Ashue, Harrah or Cowich, and deny that said last-named stations, or any of them, are intermediate to said station of Kennewick and said city of Portland upon the line of defendant Northern Pacific Railway Company, passing between said points, or that said stations, or any of them, are

intermediate to said station of Kennewick and said points of destination, or any of them, mentioned in the complaint.

II.

Deny that said, or any, through route from said station of Kennewick to said points of delivery, or any of them, passes through said stations of Midvale, Ashue, Harrah or Cowich; and deny that said railroad or said joint route from said station of Kennewick to said points of delivery, or any of them, passes through said last-named stations, or any of them.

III.

Admit, subject to verification, that Walter A. Perry Company made the shipments of potatoes between the points described in paragraph V of the first cause of action of said complaint and paid freight charges thereon, as alleged in said paragraph. [198]

IV.

Deny that neither of defendants ever applied to the Interstate Commerce Commission for authority to charge less from said station of Kennewick to said points of delivery, or any of them, than from said intermediate stations, or any of them, to said points of delivery, or any of them.

V.

Aver that they have not sufficient knowledge, information, or belief upon the subject to enable them to answer any of the allegations contained in paragraphs VII and IX of the first cause of action of said complaint, and, upon that ground,

deny each and every, all and singular, the allegations contained in said paragraphs, and each of them.

Answering the second cause of action set forth in said complaint, said defendants admit, aver and deny as follows:

I.

Admit, subject to verification, that John Demartini Company, a corporation, made the shipments of potatoes between the points described in paragraph V of the second cause of action of said complaint, and paid the freight charges thereon, as alleged in said paragraph.

II.

Deny that neither of defendants ever applied to the Interstate Commerce Commission for authority to charge less from said station of Kennewick to said points of delivery, or any of them, than from said intermediate stations, or any of them, to said points of delivery, or any of them.

III.

Aver that they have not sufficient knowledge, information or belief upon the subject to enable them to answer any of the allegations set forth in paragraph VII of said second cause of action, and, upon that ground, deny each and every, all and singular, the allegations in said paragraph contained.

Answering the third cause of action set forth in said complaint, said defendants admit, aver and deny as follows, to wit: [199]

I.

Deny that the railroad line of defendant Northern Pacific Railway Company, between the city of Kennewick in the State of Washington, and the city of Portland, in the State of Oregon, passes through the station of Ashue, and deny that said station of Ashue is intermediate upon said line of railroad to the station of Kennewick and the city of Portland or to said station of Kennewick and any of the points of destination named in said third cause of action.

II.

Deny that said, or any, through route from said station of Kennewick to said points of delivery, or any of them, passes through said station of Ashue, or that said or any railroad, or said or any joint route from said station of Kennewick to said points of delivery, or any of them, passes through said station of Ashue or that the same was an intermediate station upon said railroad line or route.

III.

Admit, subject to verification, that L. Scatena & Company—A. Galli Fruit Company, consolidated, made the shipments of potatoes between the points described in paragraph V of the third cause of action of said complaint, and paid the freight charges thereon, as alleged in said paragraph.

IV.

Deny that neither of defendants ever applied to the Interstate Commerce Commission for authority to charge less from said station of Kenne-

wick to said points of delivery, or any of them, than from said intermediate stations, or any of them, to said points of delivery, or any of them.

V.

Aver that they have not sufficient knowledge, information or belief upon the subject to enable them to answer any of the allegations contained in paragraph VII of said third cause of action, and, upon that ground, deny each and every, all and singular, the allegations in said paragraph contained. [200]

Answering the fourth cause of action set forth in said complaint, defendants admit, deny and aver as follows, to wit:

I.

Admit, subject to verification, that F. M. Burnham made the shipments of potatoes between the points described in paragraph V of the fourth cause of action of said complaint, and paid the freight charges thereon, as alleged in said paragraph.

II.

Deny that neither of defendants ever applied to the Interstate Commerce Commission for authority to charge less from said station of Kennewick to said points of delivery, or any of them, than from said intermediate stations, or any of them, to said points of delivery, or any of them.

III.

Aver that they have not sufficient knowledge, information or belief upon the subject to enable them to answer any of the allegations contained in

paragraph VII of said fourth cause of action, and, upon that ground, deny each and every, all and singular, the allegations in said paragraph contained.

SECOND SEPARATE DEFENSE.

And for a further, separate and second answer and defense to said complaint and each and all of the causes of action therein set forth, defendants aver that the stations of Midvale, Ashue, Harrah and Cowich, and each of them, are not situated upon the line of defendant Northern Pacific Railway Company passing between the city of Kennewick, in the State of Washington, and the city of Portland, in the State of Oregon, but said stations are, and each of them is, situated upon a branch line of defendant Northern Pacific Railway Company, and that said stations are not, nor is any of said stations, intermediate upon said line of railway of Northern Pacific Railway Company passing between said city of Kennewick and said City of Portland, or between said city of Kennewick and any of the points of destination mentioned in the complaint. [201]

THIRD SEPARATE DEFENSE.

And for a further, separate and third answer and defense to said complaint and each and all of the causes of action therein set forth, defendants aver that on or about the 11th day of February, 1911, these defendants filed with the Interstate Commerce Commission an application in writing requesting that said Commission authorize and permit said defendants to charge rates upon po-

tatoes and other commodities between the cities of San Francisco, Oakland, San Jose, Stockton, Marysville and Los Angeles, and other points in the State of California, and the town of Pasco, in the State of Washington, lower than the rates from said California points to points on the Northern Pacific Railway Company intermediate to said town of Pasco, Washington. That the station of Kennewick is situated upon the line of defendant Northern Pacific Railway Company, in the State of Washington, intermediate to said California points herein named, and said station of Pasco. That said application has never been cancelled or withdrawn and the same has never been granted or refused or acted upon, either wholly or in part, by the Interstate Commerce Commission.

FOURTH SEPARATE DEFENSE.

And for a further, separate and fourth answer and defense to said complaint and each and all of the causes of action therein set forth, defendants aver that neither the plaintiff nor its assignor has, prior to the commencement of this action, or at all, applied to the Interstate Commerce Commission for reparation for or on account of the matters and things alleged in said complaint, nor has said Commission ever made an order directing either of the defendants to pay to the plaintiff, or its assignor, any sum whatsoever for or on account of the assessment or collection of freight charges upon any of the shipments alleged in the complaint.

FIFTH SEPARATE DEFENSE.

And for a further, separate and fifth answer and defense to said complaint and each and all of the causes of [202] action therein set forth, defendants aver, upon information and belief, that neither plaintiff nor its assignor has been damaged by the payment of any of the freight charges mentioned in the complaint.

WHEREFORE, said defendants pray that plaintiff take nothing by its said action and that they may be dismissed hence with their costs.

HENLEY C. BOOTH,
FRANK B. AUSTIN,
Attorneys for Defendants.

State of California,
City and County of San Francisco,—ss.

G. L. King, being first duly sworn, deposes and says, that he is an officer, to wit, assistant secretary of defendant Southern Pacific Company, a corporation, and, as such officer, is duly authorized to and does make this verification for and on behalf of said defendant; that he has read the foregoing answer and knows the contents thereof and the same is true of his own knowledge, except as to the matters which are therein stated on information or belief and as to those matters that he believes it to be true.

G. L. KING.

Subscribed and sworn to before me this 28th day of September, 1922.

[Seal] FRANK HARVEY,

Notary Public in and for the City and County of San Francisco, State of California.

Due service of the within answer is admitted this 28th day of September, 1922.

A. J. HARWOOD,
Attorney for Plaintiff.

[Endorsed]: Filed Sep. 28, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [203]

(Title of Court and Cause—No. 16746.)

Trial Stipulation.

It is stipulated that the allegations of paragraphs VII and IX of the first cause of action stated in the complaint are true and that no evidence thereof need be offered at the trial.

It is stipulated that the allegations of paragraph VII of the second, third and fourth causes of action stated in the complaint are true and that no evidence thereof need be offered at the trial.

Dated: March 9, 1923.

ALFRED J. HARWOOD,
Attorney for Plaintiff.
HENLEY C. BOOTH,
FRANK B. AUSTIN,
Attorneys for Defendants.

So ordered.

R. S. BEAN,
Judge.

[Endorsed]: Filed Mch. 12, 1923. Walter B. Maling, Clerk. [204]

At a stated term, to wit, the March term, A. D. 1923, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Wesdnesday, the 14th day of March in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable GEORGE M. BOURQUIN, District Judge for the District of Montana, designated to hold and holding this cause.

(Title of Cause—No. 16746.)

Minutes of Court—March 14, 1923—Order Allowing Defendant to File an Amendment to Answer.

* * * * * * * *

Ordered that defendant may file an amendment to answer.

* * * * * * * *

Defendants moved for a nonsuit on the grounds stated; which motion was submitted after arguments by counsel and being fully considered was denied.

* * * * * * * *

[205]

(Title of Court and Cause—No. 16746.)

Amendment to Answer.

Now come the defendants above named, and, by leave of Court first had and obtained, file this their amendment to their answer heretofore filed herein as follows:

THIRD SEPARATE DEFENSE.

And for a further, separate and third answer and defense to said complaint, defendants aver that on or about the 11th day of February, 1911, these defendants filed with the Interstate Commerce Commission an application in writing requesting that said Commission authorize and permit said defendants to charge rates upon potatoes and other commodities between the cities of San Francisco, Oakland, San Jose, Stockton, Marysville and Los Angeles, and other points in the State of California, and the town of Pasco, in the State of Washington, lower than the rates from said California points to points on the Northern Pacific Railway Company intermediate to said town of Pasco, Washington.

On or about the third day of February, 1914, the Interstate Commerce Commission duly gave, made and entered its order, known as Fourth Section Order. No. 3700, a copy of which is hereto attached, marked Exhibit "A," and made a part hereof.

That the station of Kennewick is situated upon the line of defendant Northern Pacific Railway

Company, in the State of Washington, 2.7 miles west of said station of Pasco and the same is a point on the said line adjacent and in close proximity to said station of Pasco, and is also intermediate to said California points herein named and said station of Pasco. That on or about the 17th day of May, 1911, the rates on potatoes from Pasco to said California points herein named were extended by said defendants to said station of Kennewick, and ever since that time said rates from Kennewick to said California destinations have been the same as the rates from Pasco to said destinations. [206]

That said application above referred to, which was filed with the Interstate Commerce Commission on or about the 11th day of February, 1911, has never been cancelled or withdrawn, and the same has never been granted or refused or acted upon, either wholly or in part, by the Interstate Commerce Commission; that said Fourth Section Order No. 3700 has never been vacated, modified or set aside in whole or in part and was in full force and effect during all the times mentioned in the complaint herein and at the time of the movement of each of the shipments therein referred to, except that section 6 thereof has been eliminated.

H. C. BOOTH,
F. B. AUSTIN,
Attorneys for Defendants. [207]

State of California,
City and County of San Francisco,—ss.

G. L. King, being duly sworn, deposes and says:

That he is an officer, to wit, assistant secretary of Southern Pacific Company, a corporation, one of the defendants named in the foregoing amendment to answer, and as such officer he is duly authorized to and does make this verification for and on behalf of said corporation; that he has read the foregoing amendment to answer and knows the contents thereof, and the same is true of his own knowledge, except as to the matters which are therein stated on information or belief and as to such matters he believes it to be true.

G. L. KING.

Subscribed and sworn to before me this 14th day of March, 1923.

[Seal] FRANK HARVEY,

Notary Public in and for the City and County of San Francisco, State of California. [208]

Exhibit "A."

"The Commission being of the opinion that the convenience of the carriers, the public, and the Commission will be better served by assembling in one general fourth section order, divided into numbered sections for convenient tariff reference, the general fourth section orders known as Fourth Section Order No. 100, General No. 2; Fourth Section Order No. 485, General No. 9; Fourth Section Order No. 839, General No. 11; and Fourth Section Order No. 2200, General No. 12, and experience having suggested certain modifications in the description of conditions under which relief has been

afforded by these orders, and certain additional situations as to which carriers may be relieved from the operation of said section, therefore,

"It is ordered, That Fourth Section Order No. 100, General No. 2; Fourth Section Order No. 485, General No. 9; Fourth Section Order No. 839, General No. 11; and Fourth Section Order No. 2200, General No. 12, be, and the same are hereby, vacated and set aside as of March 15, 1914.

"It is further ordered, That effective March 15, 1914, as to and confined in all cases to rates and fares which are included in and covered by applications for relief from the provisions of the fourth section of the act to regulate commerce that were filed with the Commission on or before February 17, 1911, and until the applications included and covering such rates or fares have been passed on by the Commission, carriers may file with the Commission, in the manner and form prescribed by law and by the Commission's regulations, such changes in rates and fares as occur in the ordinary course of their business, continuing higher rates or fares at intermediate points, and through rates or fares higher than the combination of intermediate rates or fares, provided that in so doing the discrimination against intermediate points is not thereby increased. [209]

"It is further ordered, That as to and confined in all cases to rates which are included in and covered by applications as above described, carriers may file with the Commission, in the manner and form prescribed by law and by the Commission's

regulations, changes in rates under the following conditions, although the discrimination against intermediate points is thereby increased:

"Section 1. A through rate which is in excess of the aggregate of the intermediate rates lawfully published and filed with the Commission may be reduced to equal the sum of the intermediate rates.

"Section 2. Where a through rate has been, or is hereafter, reduced under the authority of section 1 of this order, carriers maintaining through rates via other routes between the same points may meet the rates so made by the route initiating the reduction.

"Section 3. Where a reduction is made in the rate between two points under the authority of section 1 of this order, such reduction may extend to all points in the group which takes the same rates as does the point from or to which the rate has been reduced.

"Sec. 4. Where through rates are in effect which exceeds the lowest combination of rates lawfully published and filed with the Commission, carriers may correct said through rates by reducing the same to equal such lowest combination.

"Sec. 5. A longer line or route may reduce the rates in effect between the same points or groups of points to meet the rates of a shorter line or route when the present rates via either line do not conform to the fourth section of the act, under the following circumstances:

(a) Where the longer line is meeting a reduction in rates initiated by the shorter line. [210]

(b) Where the longer line has not at any time heretofore met the rates of the shorter line.

"Sec. 6. A newly constructed line publishing rates from and to its junction points under the authority contained in paragraph (b) of section 5, may establish from and to its local stations rates in harmony with those established from and to junction points.

"Sec. 7. Carriers whose rates between certain points do not conform to the fourth section of the act, which rates have been made lower than rates at intermediate points to meet the competition of water or rail-and-water carriers between the same points, may make such further reductions in rates as may be required to continue to effectively meet the competition of rail-and-water or all-water lines.

"Sec. 8. Where rates are in effect from or to a point that are lower than rates effective from or to intermediate points, carriers may extend the application of such rates to, or establish rates made with relation thereto at, points on the same line adjacent or in close proximity thereto, provided that no higher rates are maintained from and to points intermediate to the former point and the new point to which the application of the same or relative rates has been extended.

"Sec. 9. Where there is a rate on a commodity from or to one or more points in an established group of points from and to which rates are ordinarily the same, but the rate on the said commodity does not apply at all points in the said group, such

rate may be made applicable to or from all of such other points.

"Sec. 10. Where there is a definite and fixed relation between the rates from and to adjacent or continuous groups of points, and the rates to or from one of said groups are changed, corresponding changes may be made in the rates of the other [211] groups to preserve such relations.

"Sec. 11. In cases where no through rates are in effect via the various routes or gateways between two points, and the combination of lawfully published and filed rates via one gateway makes less than the combinations via the other gateway, a through rate may be established on the basis of the combination via the gateway over which the lowest combination can be made, and made applicable via all gateways.

"Sec. 12. In cases where through rates are in effect between two points, via one or more routes or gateways, which are higher than the combination of lawfully published and filed rates via one of these gateways, different carload minima being used on opposite sides of the gateway, a through rate may be established equal to the lowest combination of lawfully published and filed rates, using the higher of the carload minima but continuing the present higher through rate if based upon a lower carload minimum.

"The Commission does not hereby approve any rates that may be filed under this authority, all such rates being subject to complaint, investiga-

tion, and correction if in conflict with any provision of the act.

"And it is further ordered, That when the Commission passes upon any application for relief from the provisions of the fourth section with respect to the rates referred to herein, the order issued with relation thereto will automatically cancel the authority herein granted as to the rates covered and affected by such order."

[Endorsed]: Filed Mch. 14, 1923. Walter B. Maling, Clerk. [212]

At a stated term, to wit, the March term, A. D. 1923, of the Southern Division of the United States District Court, in and for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 18th day of June, in the year of our Lord one thousand nine hundred and twenty-three. Present: the Honorable MAURICE T. DOOLING, District Judge.

(Title of Cause—No. 16746.)

Minutes of Court—June 18, 1923—Order for Judgment.

In accordance with the decision of the Honorable George M. Bourquin, United States District Judge for the District of Montana (before whom this case was heretofore tried), which said decision is this day filed,

IT IS ORDERED that judgment be entered herein in favor of plaintiff and against the defendants upon special findings to be filed. [213]

(Title of Court and Cause—No. 16746.)

Findings of Fact and Conclusions of Law.

The above-entitled action came duly on for trial on the 14th day of March, 1923, the plaintiff being represented by Alfred J. Harwood, his attorney, and the defendants by Messrs. Elmer Westlake, James E. Lyons, and Frank B. Austin, their attorneys.

Said action was tried on the 14th and 15th days of March, 1923, and was thereupon submitted to the Court for its decision. After due consideration the Court makes and files this its decision, embracing its findings of fact and conclusions of law, as follows:

I.

That all of the allegations of subdivisions I, II, IV, VI, VII, VIII and IX of the first cause of action stated in the complaint herein, are true and are sustained by evidence. That all of the allegations of subdivisions I, II, III, IV, V, VI and VII of the second cause of action stated in the complaint herein are true and are sustained by the evidence. That all of the allegations of subdivisions I, II, IV, VI, and VII of the third cause of action stated in the complaint are true and are sustained by the evidence. That all of the allegations of subdivisions I, II, III, IV, V, VI and VII of the fourth cause of action stated in the complaint are true and are sustained by the evidence.

II.

That all of the allegations of subdivisions III

and V of the first and third causes of action stated in the complaint, are true and are sustained by the evidence except as otherwise specifically found by finding of fact number III, and except as otherwise specifically found in finding of fact number III, all of the allegations of said subdivisions III and V of said causes of action are true and are sustained by the evidence.

III.

That the stations of Harrah, Ashue and Cowiche, mentioned [214] and described in subdivisions III and V of the first and third causes of action stated in the complaint are not on the main line of the defendant, Northern Pacific Railway Company, between Kennewick and Portland, but are on short branch or spur lines which connect with said main line between Kennewick and Portland; that said stations are distant from the main line as follows, viz.:

Name of Station	Distance from Main Line in Miles
Harrah	9.5
Ashue	5.2
Cowiche	9.2

that the points from which said branch lines to said stations above mentioned diverge from the said main line are all more than 67 miles west of Kennewick, and are all intermediate between Kennewick and Portland. That in case of shipments from said stations, the plaintiff is not entitled to recover the full amount of the alleged overcharge stated in subdivisions V of the first and

third causes of action stated in the complaint, but is entitled to recover the difference between said alleged overcharge and the charge then made by defendant, Northern Pacific Railway Company, for the haul from said stations respectively to said main line; that the amount of the overcharge on shipments from said stations is as follows: In shipment from Ashue in Car No. CNJ 9180, the amount of the overcharge was and is the sum of $49.80 instead of the sum of $74.49 as stated in the complaint. In the case of the shipment from Ashue in Car Number RI 66069, the amount of the overcharge was and is the sum of $57.04 instead of the sum of $85.56 as stated in the complaint. In the shipment from Harrah in Car Number NP 98678, the amount of the overcharge was and is the sum of $71.23 instead of the sum of $92.77 as stated in the complaint. In the shipment from Cowiche in Car Number NP 96854 the amount of the overcharge was and is the sum of $46.37 instead of the sum of $70.25 as stated in the complaint. In the shipment from Ashue in Car Number [215] B&O 13657, the amount of the overcharge was and is the sum of $53.62 instead of the sum of $80.43 as stated in the complaint. In the shipment from Ashue in Car Number CBQ 38539, the amount of the overcharge was and is the sum of $52.52 instead of the sum of $78.78 as stated in the complaint. In the shipment from Ashue in Car Number NYC 152247 the amount of the overcharge was and is the sum of $54.26 instead of the sum of $81.37 as stated in the complaint. That in the

shipment from Ashue in Car Number CSTPM 8620, the amount of the overcharge was and is the sum of $53.40 instead of the sum of $80.10 as stated in the complaint. That for all practical rate-making purposes said stations mentioned in this finding are intermediate between Kennewick and Portland, and also between Kennewick and the stations of delivery. That the shipment made in Car. No. L&N 15838 from Midvale as described in subdivision V of the first cause of action stated in the complaint was not made over the lines of the defendants.

IV.

With relation to the second separate defense set up in defendant's answer, the Court finds as follows: That the stations mentioned in said separate defense with the exception of Midvale are not on the line of the Northern Pacific Railway Company passing between Portland and Kennewick, but are on short branch lines which diverge from said main line, as more specifically appears in finding of fact No. III; that for all practical rate-making purposes said stations, with the exception of Midvale, are intermediate between Kennewick and Portland, and between Kennewick and the points of destination mentioned in the complaint. That said station of Midvale is not on the line of the defendant Northern Pacific Railway Company.

V.

That on October 14, 1910, the Interstate Commerce Commission made an order in the words and figures set forth in Exhibit "A" attached to and

made a part of these findings; that on December 16, 1910, the defendants filed with the Interstate Commerce Commission a so-called application for [216] relief from the provisions of the fourth section of the Interstate Commerce Act, a copy of which said so-called application is marked Exhibit "B" and made a part of these findings; that on December 16, 1910, said defendants filed with the Interstate Commerce Commission a so-called application for relief from the provisions of the fourth section of the Interstate Commerce Act, a copy of which said so-called application is marked Exhibit "C" and made a part of these findings.

That on or about the 11th day of February, 1911, the defendants filed with the Interstate Commerce Commission an application in writing requesting that said Commission authorize and permit said defendants to charge rates upon potatoes and other commodities between the cities of San Francisco, Oakland, San Jose, Stockton, Marysville and Los Angeles, and other points in the State of California, and the town of Pasco, in the State of Washington, lower than the rates from said California points to points on the Northern Pacific Railway Company intermediate to said town of Pasco, Washington; that a copy of said application is annexed to and made a part of these findings and marked Exhibit "D."

That on or about February 3d, 1914, the Interstate Commerce Commission made and entered an order denominated, "Fourth Section Order No. 3700"; that the copy of said order, marked Exhibit

"A," and attached to the amendment to the answer of the defendants, is a true copy of said order, except that before the part of the said order set forth in said Exhibit "A," the following occurs, viz.: "In the matter of permitting ordinary changes in rates pending action upon applications for relief from the provisions of the Fourth Section of the Act to Regulate Commerce as amended June 18, 1910."

That the station of Kennewick is situated upon the line of defendant Northern Pacific Railway Company, in the State of Washington, three miles west of said station of Pasco and is also intermediate to said California points named in the complaint, [217] and said station of Pasco. That on or about the 17th day of May, 1911, the rates on potatoes from Pasco to said California points herein named were extended by said defendants to said station of Kennewick, and ever since that time said rates from Kennewick to said California destinations have been the same as the rates from Pasco to said destinations; that said station of Pasco is on the east side and said station of Kennewick is on the west side of the Columbia River.

That said application above referred to, which was filed with the Interstate Commerce Commission on or about the 11th day of February, 1911, has never been cancelled or withdrawn, and the same has never been granted or refused or acted upon, either wholly or in part, by the Interstate Commerce Commission; that said Fourth Section

Order No. 3700 has never been vacated, modified or set aside in whole or in part, except that Section 3 thereof has been eliminated.

V.

That the allegations of the alleged fourth separate defense pleaded in the answer of the defendants are true and are sustained by the evidence.

VI.

That plaintiff and his assignors have been damaged by the payment of the freight charges mentioned in the complaint; that with the exception of the cause of action which is barred as found in finding of fact, No. VII, the plaintiff and his assignors has been damaged by the amount of the overcharges as hereinabove found, plus the interest on each overcharge at the rate of seven per cent (7%) per annum, from the date of the payment thereof to the date of judgment herein.

VII.

That the cause of action based on the shipment first described in the schedule contained in subdivision V of the first cause of action stated in the complaint is barred by the provisions of section 16 of the Interstate Commerce Act.

VIII.

That the reasonable sum to be allowed plaintiff as and [218] for attorney's and counsel fees herein is the sum of Eleven Hundred Dollars ($1100.00), which said sum is hereby taxed as part of the costs of the case.

XI.

That the amount in controversy in this suit ex-

ceeds, exclusive of interest and costs, the sum or value of $3000.00 and is between citizens of different states, to wit, between the plaintiff a citizen and resident of the State of California and the defendants who are citizens and residents of the States of Minnesota and Kentucky.

CONCLUSIONS OF LAW.

As conclusions of law from the foregoing findings of fact the Court finds:

I.

That plaintiff is entitled to judgment against defendants for the sum of Seven Thousand One Hundred Ninety-eight Dollars and Ninety-five Cents ($7198.95), being the total amount of the overcharges collected by defendants, except the overcharge the cause of action to recover which is barred by limitation as found in finding VII, together with interest on each separate overcharge at the rate of seven per cent per annum from the date of the payment thereof, as alleged in the complaint, to the date of judgment; that the total amount of said interest to the 1st day of July, 1923, is the sum of Eight Hundred Seventeen Dollars and Forty-five Cents ($817.45); that the interest on said overcharge amounts to the sum of One Dollar and Thirty-nine Cents ($1.39) per day.

II.

That plaintiff is entitled to judgment for the sum of Eleven Hundred ($1100.00) Dollars as attorney's and counsel fees herein, which said sum shall be taxed as part of the costs of the case.

III.

That plaintiff is entitled to judgment for his costs of suit. [219]

Let judgment be entered accordingly.

Dated this 8 day of Aug., 1923.

BOURQUIN,
District Judge.

If amendment of the relief prayed (amount) does not conform to body of complaint, it is deemed amended to that end.

BOURQUIN,
J. [220]

Exhibit "A."

INTERSTATE COMMERCE COMMISSION.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 14th day of October, A. D. 1910. Present: MARTIN A. KNAPP, JUDSON C. CLEMENTS, CHARLES A. PROUTY, FRANCIS M. COCKRELL, FRANKLIN K. LANE, EDGAR E. CLARK, JAMES S. HARLAN, Commissioners.

IN THE MATTER OF APPLICATION FOR RELIEF UNDER THE FOURTH SECTION OF THE ACT TO REGULATE COMMERCE as AMENDED June 18, 1910.

A public hearing having been had, and it appearing that changes in rates and fares occurring in the ordinary course of business should be possible, pending the time when formal applications

to be relieved from the requirements of section 4 of the act to regulate commerce are to be filed by the carrier subject to that act:

IT IS ORDERED: That until February 17, 1911, said carriers may file with the Commission, in manner and form as prescribed by law and by the Commission's regulations, such changes in rates and fares as would occur in the ordinary course of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points, and through rates or fares higher than the combinations of the intermediate rates or fares, provided that in so doing the discrimination against intermediate points is not made greater than that in existence on August 17, 1910, except when a longer line or route reduces rates or fares to the more distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the short line. The Commission does not hereby approve any rates or fares that may be filed under this permission. All such rates and fares being subject to complaint, investigation, and correction if they conflict [221] with any other provisions of the act.

IT IS FURTHER ORDERED, that such of said carriers as desire to be relieved from any of the requirements of Section 4 of the Act shall, on or before February 17, 1911, file with the Commission applications as provided in said section 4 and in form as hereinafter prescribed.

Separate applications shall be made as to freight rates and passenger fares. Separate applications

shall also be made for relief under the long-and-short-haul provision and for relief under the prohibition against through rates or fares in excess of the combination of the intermediate rates or fares.

Separate applications should also be made for different situations governed by different rate adjustments or competitive influences.

Such applications must be certified, and where the relief sought is the same for two or more carriers in the same territory as to the same traffic application may be made jointly for two or more carriers by a joint agent or attorney, where the rates are contained in a joint tariff a petition from the carrier that issues the tariff, specifying the tariff by I. C. C. number, may be made on behalf of the carriers lawfully parties to the tariff and will be held and considered to be on behalf of all carriers concurring in the tariff.

Application for relief must be made on part of that carrier which actually charges more for the shorter haul than for the longer distance. For example, through rates from C. F. A. territory to the southeast made in combination on the Ohio River crossings. If the roads north of the river do not charge less for a longer distance haul to the river and the roads south of the river do charge more for a shorter haul, the application should be made on behalf of the roads south of the river.

If a joint rate or fare is reasonably less than the combination of the intermediate rates or fares, the carriers accepting divisions of such joint rate or

fare will not [222] ordinarily be held to thereby violate the fourth section of the act.

IT IS FURTHER ORDERED, that the Commission reaffirm its previously expressed view that a through rate or fare that is higher than the combination of the intermediate rates or fares is *prima facie* unreasonable (Rule 56 (b) Tariff Circular 17–A) and will insist upon the application of that principle at the earliest possible date in every instance except possible extreme and very unusual cases.

IT IS FURTHER ORDERED. That applications for relief from the provisions of the fourth section of the act shall be in such of the following forms as meet the conditions as to which such relief is sought:

(a) The —— (name of carrier) ——, through —— (name of officer or agent making application), its —— (official title) ——, petitions the Interstate Commerce Commission for authority to establish rates for the transportation of —— (name of commodity or description of traffic) —— from —— (name or description of point or points of origin) to —— (name or description of point or points of destination) —— lower than rates concurrently in effect to intermediate points —— (names or description of intermediate points) ——; the highest charge of such intermediate points to apply at —— (name of intermediate point) ——, and to be not more than —— (cents per hundred pounds, per ton, per car, or per package) —— in excess of the rates to —— (name of more distant point at which lower

rate is proposed) ——. This application is based upon the desire of petitioner to meet by direct haul over a longer line or route competitive conditions created at —— (name or description of more distant point or points at which lower rates are proposed) —— by —— (name of railway) ——.

NOTE: The points from and to which the lower rates are desired should be stated specifically [223] whenever practicable. If the applications applied to a situation in which rates or fares from or to a large number of points are based upon, or bear a fixed relation to, the rate or fare from a basing point to the destination in question, it will be sufficient to so state and to give the highest charge proposed from that basing point and the point at which highest charge will apply. If application refers to a particular commodity as to which it is desired to establish commodity rates from points of production or ports of transshipment, leaving higher class rates to apply from intermediate points, that fact should be stated and the producing points or ports should be named. When it is not practicable to name all the poinas of origin, or destination, and they can be accurately described by well-established and familiar names of traffic territories, such descriptions may be used; for example, "From Atlantic seaboard territory as described in —— tariff. I. C. C. No. ——" or "From C. F. A. territory."

(b) Same form as (a) shall be used except that the reason which is relied upon as justifying the application shall be stated to be desired to meet by direct haul lower rates fixed at the more distant point by competition of water carriers, specifying whether the competition is created by regular line or so-called "tramp" vessels, and if the former, the name of the line or lines.

(c) Application shall be made in the same form as (a), except that the reason relied upon in support of same shall be stated to be a desire to meet competition at the more distant point created by water carriers or shorter-line railroad, and to base the rates at intermediate points upon the rate to the more distant competitive point plus a local or charge back. The application shall also show whether the charge for the back haul is the full local or a proportional or an arbitrary rate.

(d) Application shall be made in general form the same as (a), [224] but shall request authority to charge a higher rate as the through route than the aggregate of the intermediate rates subject to the provisions of the act. Application shall state clearly the reasons in support thereof, and shall specify the extent to which it is desired to make the through rate higher than the aggregate of the intermediate rates.

The same forms, modified as may be necessary, shall be used for applications relative to passenger fares, whenever it is practicable the application, either as to the freight rates or passenger fares, should cite by I. C. C. numbers the tariff or tariffs

in which appear the rates, continuance of which is desired, whenever, it is practicable to confine the application to definite points of origin and destination, or to one or more named commodities, that should be done, and whenever practicable the rates themselves should be stated. Each carrier may file as many applications as are necessary to properly present the several situations as to which it desires relief, and it is desirable that each particular situation be treated by itself.

A true copy:

(Signed) EDW. A. MOSELEY,
Secretary. [225]

Exhibit "B."

PACIFIC FREIGHT TARIFF BUREAU.
San Francisco, Cal.
December 10, 1910.

To the Interstate Commerce Commission,
Washington, D. C.

APPLICATION FOR RELIEF FROM PROVISIONS OF FOURTH SECTION OF AMENDED COMMERCE ACT FOR ACCOUNT OF PACIFIC FREIGHT TARIFF BUREAU JOINT AND PROPORTIONAL FREIGHT TARIFF NO. 1, I. C. C. NO. 2 OF F. W. GOMPH, AGENT, WHICH IS ON FILE WITH YOUR HONORABLE COMMISSION:

In the name and on behalf of each of the carriers parties to the Tariff named above, the undersigned,

acting as Agent and Attorney, or under authority of concurrences on file with the Commission from each of the said carriers, respectfully petitions the Interstate Commerce Commission for authority to continue all rates shown in above named Tariff, from and to points named, LOWER than rates concurrently in effect to intermediate points through which traffic moves, in Canada, and in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Utah and Washington, and points in states east thereof, including District of Columbia.

This application is based upon the desire of the interested carriers to continue the present method, basis or principle of making rates lower at the more distant points than at the intermediate points; such lower rates being necessary by reason of—Competition of various water carriers operating upon the Atlantic and Pacific Oceans; Competition of carriers operating on the Atlantic and Pacific Oceans, partly by water and partly by rail; Competition of various water carriers operating coastwise on the Pacific Ocean; and of carriers partly by water (operating coastwise on the Pacific Ocean and upon the rivers of California and Oregon) and partly by rail between Pacific Coast ports and points in the interior; Rates established via the shorter or more direct routes, and applied via the longer or more circuitous route or routes; Competition between carriers [226] or routes subject to the Act to Regulate Commerce; Competition between markets of production and distribution.

A further petition is respectfully made asking for authority to waive that portion of the Fourth Section of the Amended Act, which provides that the through rate shall not exceed the aggregate of the intermediate rates subject to the provisions of the Act, or to permit your petitioner to publish in each of its Tariffs a clause as follows:

The aggregate of the local rates (class or commodity) to and from any intermediate point, when less than the through rates (class or commodity) shown in this Tariff, will apply as the through rate.

OR

The charges collected for the transportation of a shipment from and to, or between, points named in this Tariff and thereby made a part of this Tariff, MUST NOT EXCEED what the charges would be by applying thereon the aggregate of the lawful intermediate rates in force via the route over which the shipment moved.

LINE OF A GIVEN RAILROAD, there will be found instances where the aggregate of the intermediate rates will be less than the through rates in that Tariff. This condition is almost unavoidable because different bases are used upon different portions of the same line.

F. W. GOMPH,
Agent.

Subscribed and sworn to before me this tenth (10) day of December, 1910.

PEDRO SAIZ,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires May 26, 1914. [227]

Exhibit "C."

PACIFIC FREIGHT TARIFF BUREAU.
San Francisco, Cal.
December 10, 1910.

To the Interstate Commerce Commission,
Washington, D. C.

APPLICATION FOR RELIEF FROM PROVISIONS OF FOURTH SECTION OF AMENDED COMMERCE ACT FOR ACCOUNT OF PACIFIC FREIGT TARIFF BUREAU AND PROPORTIONAL FREIGHT TARIFF NUMBER 1–A, I. C. C. NO. 62 OF F. W. GOMPH, AGENT, WHICH IS ON FILE WITH YOUR HONORABLE COMMISSION.

In the name and on behalf of each of the carriers that are parties to the above-named tariff the undersigned as agent and attorney or under authority of concurrences on file with the Commission from each of said carriers, respectfully petitions the Interstate Commerce Commission for authority to continue all rates shown in the above-named tariffs between San Francisco, Oakland, San Jose, Stockton, Marysville, Los Angeles and other points in California named in said tariff *and* Spokane, Walla Walla, Washington, Pendleton and Baker City, Oregon, and Warden, Osborne, Mullen, Idaho, and other points in Oregon, Washington and Idaho named in said tariff lower than the rates concur-

rently in effect at intermediate points on the Northern Pacific Railway.

This application is based on the desire of the Northern Pacific Railway to meet by direct haul over a longer line or route, competitive conditions created at Bunn, Burke, Dorn, Gem, Hecla, Larson, Mine, Mullen, Wall and Warden, Idaho, by the Oregon-Washington Railway and Navigation Co. met by the Northern Pacific via Paradise and St. Regis, Montana, the longer and more circuitous route, but not applicable at Intermediate points along that line between Wauser and Larson, Idaho, for the reason that short line competition does not exist at such intermediate points.

It is not practical to state in this petition the [228] rates in detail nor specify the higher charge at intermediate points nor the extent to which rates at the intermediate points exceed the rates at the more distant points named.

F. W. GOMPH,
Agent.

Subscribed and sworn to before me this 10th day of December, 1910.

P. SAIZ,
Notary Public in and for the City and County of San Francisco, State of California. [229]

Exhibit "D."

PACIFIC FREIGHT TARIFF BUREAU.

San Francisco, Cal.

February 11, 1911.

PETITION No. 2.

To the Interstate Commerce Commission,
Washington, D. C.

APPLICATION FOR RELIEF FROM PROVISIONS OF FOURTH SECTION OF AMENDED COMMERCE ACT FOR ACCOUNT OF TARIFF No. 1-A, I. C. C. No. 62 of F. W. GOMPH, Agent.

In the name and on behalf of each of the carriers parties to the Tariff above named, the undersigned, acting as Agent and Attorney or under authority of concurrences on file with the Commission from each of the said carriers, respectfully petitions the Interstate Commerce Commission for authority to continue all rates in above-named Tariff, between San Francisco, Oakland, San Jose, Stockton, Marysville, Los Angeles, Cal., and other points in California named in said tariff, *and* Pasco, Wash., lower than the rates to the points on the Northern Pacific Railway, intermediate to Pasco, Wash.

This application is based upon the desire of the Northern Pacific Railway to meet by direct haul over a longer line or route competitive conditions created at points directly competitive with Pasco,

Wash., such as Wallula and Hunts Junction, Wash., by the Oregon-Washington Railroad and Navigation Co.

It is not practicable in this petition to state the rates in detail nor to specify the highest charges at intermediate point, nor the extent to which rates at the intermediate points exceed the rates at the more distant points named above.

F. W. GOMPH,
Agent.

Subscribed and sworn to before me this 11th day of February, 1911.

P. SAIZ,
Notary Public in and for the City and County of San Francisco, California.

Service and receipt of a copy of the within Findings of Fact is hereby admitted this 30th day of June, 1923.

ELMER WESTLAKE,
J. E. LYONS,
Attorneys for Defendants.

[Endorsed]: Filed August 14, 1923. Walter B. Maling, Clerk. [230]

(Title of Court and Cause—No. 16746.)

Judgment on Findings.

This cause having come on regularly for trial upon the 14th day of March, 1923, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed; A. J. Harwood, Esq., appearing as attorney for plain-

tiff and Frank B. Austin and Elmer Westlake, Esqrs., appearing as attorneys for defendants and the trial having been proceeded with on the 15th day of March, 1923, and oral and documentary evidence having been introduced on behalf of the respective parties and the cause having been submitted to the Court for consideration and decision; and the Court, after due deliberation having filed its opinion and its findings in writing and ordered that judgment be entered herein in accordance with said findings:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that A. W. Knox, plaintiff, do have and recover of and from Northern Pacific Railway Company, a corporation, and Southern Pacific Company a corporation; defendants, the sum of Eight Thousand Seventy-eight and 95/100 ($8,078.95) Dollars, together with $1100.00 as attorney's fees and for costs herein expended taxed at $——.

Judgment entered August 14, 1923.

WALTER B. MALING,
Clerk. [231]

(Title of Court and Cause—No. 16746.)

Stipulation and Order Extending Time to and Including September 27, 1923, to File Bill of Exceptions.

It is hereby stipulated that the defendants have until and including September 27th, 1923, in which to prepare and serve on the plaintiffs a draft of the

proposed bill of exceptions in the above-entitled action.

A. J. HARWOOD,
Attorney for Plaintiff.
HENLEY C. BOOTH,
ELMER WESTLAKE,
JAS. E. LYONS,
Attorneys for Defendants.

So ordered.

PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Sep. 18, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [232]

(Title of Court and Cause—No. 16746.)

Stipulation and Order Extending Time to and Including October 15, 1923, to File Bill of Exceptions.

It is hereby stipulated that the defendants have until and including October 15th, 1923, in which to prepare and serve on the plaintiff a draft of the proposed bill of exceptions in the above-entitled action.

ALFRED J. HARWOOD,
Attorney for Plaintiff.
HENLEY C. BOOTH,
ELMER WESTLAKE,
JAMES E. LYONS,
Attorneys for Defendants.

So ordered.

PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Sep. 27, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [233]

(Title of Court and Cause—No. 16746.)

Stipulation and Order Extending Time to and Including October 25, 1923, to File Bill of Exceptions.

It is stipulated that the defendants have until and including October 25, 1923, in which to prepare and serve on the plaintiff a draft of the proposed bill of exceptions in the above-entitled action.

A. J. HARWOOD,
Attorney for Plaintiff.
HENLEY C. BOOTH,
ELMER WESTLAKE,
JAS. E. LYONS,
Attorneys for Defendants.

So ordered.

PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Oct. 11, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [234]

(Title of Court and Cause—No. 16746.)

Stipulation and Order Extending Time to and Including November 10, 1923, to File Bill of Exceptions.

It is stipulated that the defendants have until and including November 10, 1923, in which to prepare and serve on the plaintiff a draft of the proposed bill of exceptions in the above-entitled action.

A. J. HARWOOD,
Attorney for Plaintiff.
HENLEY C. BOOTH,
ELMER WESTLAKE,
JAS. E. LYONS,
Attorneys for Defendants.

So ordered.

PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Oct. 24, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [235]

(Title of Court and Cause—No. 16746.)

Petition for Writ of Error.

To the Honorable JOHN S. PARTRIDGE, Presiding Judge of the Above-entitled Court, and to the Judge or Judges of said District Court:

Now come the above-named defendants, Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, by Hen-

ley C. Booth, Elmer Westlake and James E. Lyons, their attorneys, and say:

That on the 14th day of August, 1923, this Court entered a judgment herein, in favor of plaintiff and against defendants, in which judgment and proceedings prior thereunto in this cause certain errors were committed to the prejudice of these defendants, all of which will more in detail appear from the assignment of errors, which is filed with this petition;

WHEREFORE, defendants pray that a writ of error may issue in their behalf to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the United States [236] Circuit Court of Appeals for the Ninth Circuit.

Dated at San Francisco, Cal., this 14th day of December, 1923.

HENLEY C. BOOTH,
ELMER WESTLAKE,
JAS. E. LYONS,
Attorneys for Defendants.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [237]

(Title of Court and Cause—No. 16746.)

Assignment of Errors.

Now come the Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, the defendants in the above numbered and entitled cause, and in connection with their petition for a writ of error herein, assign the following errors, which they aver were committed by the Court upon the trial of this case and in the rendition of the judgment against the said defendants, appearing upon the record herein, to wit:

(1) The Court erred in overruling and in not sustaining the defendants' demurrer to the original complaint filed in this cause, and in holding that plaintiff was not bound to first seek relief from the Interstate Commerce Commission before applying to the District Court.

(2) The Court erred in overruling the defendants' motion for a nonsuit.

(3) The Court erred in holding and finding that plaintiff "is entitled to recover the difference between said alleged overcharge and the charge then made by defendant, Northern Pacific Railway Company, for the haul from said stations respectively to said main line; that the amount of the overcharge on shipments from [238] said stations is as follows: In shipment from Ashue in Car Number CNJ 9180, the amount of the overcharge was and is the sum of $49.80 instead of the sum of $74.49 as stated in the complaint. In the case of the shipment from Ashue in Car Number RI 66069,

the amount of the overcharge was and is the sum of $57.04 instead of the sum of $85.56 as stated in the complaint. In the shipment from Harrah in Car Number NP 98678, the amount of the overcharge was and is the sum of $71.23 instead of the sum of $92.77 as stated in the complaint. In the shipment from Cowich in Car Number NP 96854 the amount of the overcharge was and is the sum of $46.37 instead of the sum of $70.25 as stated in the complaint. In the shipment from Ashue in Car Number B&O 13657, the amount of the overcharge was and is the sum of $53.62 instead of the sum of $80.43 as stated in the complaint. In the shipment from Ashue in Car Number CBQ 38539 the amount of the overcharge was and is the sum of $52.52 instead of the sum of $78.78 as stated in the complaint. In the shipment from Ashue in Car Number NYC 152247 the amount of the overcharge was and is the sum of $54.26 instead of the sum of $81.37 as stated in the complaint. That in the shipment from Ashue in Car Number CSTPM 8620, the amount of the overcharge was and is the sum of $53.40 instead of the sum of $80.10 as stated in the complaint."

(4) The Court erred in holding and finding that for all practical rate-making purposes the stations of Harrah, Ashue and Cowiche are intermediate between Kennewick and Portland, and also between Kennewick and the stations of delivery.

(5) The Court erred in holding and finding: "That plaintiff and his assignors have been damaged by the payment of the freight charges mentioned in the complaint; that with the exception

of the cause of action which is barred as found in Finding of Fact No. VII, the plaintiff and his assignors has been damaged by the amount of the overcharges as hereinabove found, plus the interest on each overcharge at the rate of seven per cent (7%) per annum, from the date of [239] the payment thereof to the date of judgment therein."

(6) The Court erred in holding and deciding that: "Whether or not defendants' application to be relieved from Section 4 was in proper form and time, it affords no protection in respect to the violations of Section 4 involved in the charges herein. These violations were by reason of rates initiated subsequent to the amendment of 1910, and so not within the latter's continuance of rates 'lawfully existing at the time of the passage of this Act' until applications made to continue them were by the Commission determined. They were only within that provision of Section 4 which provided that application for relief could be made and granted 'in special cases after investigation.' That is, rates to be thus granted or authorized, but which could not be legally charged until thus granted or authorized."

(7) The Court erred in holding and deciding that the defendants application to be relieved from the provisions of the 4th Section of the Interstate Commerce Act introduced in evidence herein afforded no protection in respect to the alleged violations of Section 4 of said act, involved in the complaint herein.

(8) The Court erred in holding and deciding

that the 4th Section Orders of the Interstate Commerce Commission introduced in evidence herein, were made without authority and are void in as far as they authorize the alleged departures from the provisions of the 4th Section of the Interstate Commerce Act, complainted of in this action.

(9) The Court erred in finding and holding that plaintiffs are entitled to judgment for the sum of Eleven Hundred ($1100.00) Dollars, or any other sum, as attorney's and counsel fees herein.

(10) The Court erred in holding and deciding that the separate defenses pleaded in the defendants' answer to the complaint and the amendments thereto and in the amendments made to conform to the proofs do not constitute a full and complete defense to this action. [240]

(11) The Court erred in not rendering judgment on its findings in favor of defendants and against the plaintiff.

WHEREFORE, the said defendants pray that the judgment of the District Court may be reversed.

Dated: San Francisco, Cal., this 14th day of December, 1923.

HENLEY C. BOOTH,
ELMER WESTLAKE,
JAS. E. LYONS,
Attorneys for Defendants.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [241]

(Title of Court and Cause—No. 16746.)

Order Allowing Writ of Error.

On this 2d day of January, 1924, came the above-named Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, the defendants herein, by Henley C. Booth, Elmer Westlake and James E. Lyons, their attorneys, and filed herein and presented to this Court, their petition praying for the allowance of a writ of error and the assignment of errors intended to be urged by them, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises;

And the said parties having filed herein a stipulation in writing waiving bond for costs and a supersedeas bond,

On consideration whereof, this Court does hereby allow the writ of error and orders that said writ of error issue without requiring the filing of any bond.

Dated: San Fancisco, Cal., this 2d day of January, 1924.

FRANK H. RUDKIN,
United States Circuit Judge.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [242]

(Title of Court and Cause—No. 16746.)

Stipulation and Order Waiving Bonds on Allowance of Writ of Error.

IT IS HEREBY STIPULATED that a writ of error may be allowed and granted upon defendants' petition therefor without the filing of any supersedeas bond or bond for costs, and that supersedeas and costs bond is hereby waived.

Dated: San Francisco, Cal., this 14th day of December, 1923.

ALFRED J. HARWOOD,
Attorney for Plaintiff.
HENLEY C. BOOTH,
ELMER WESTLAKE,
JAMES E. LYONS,
Attorneys for Defendants.

So ordered.

FRANK H. RUDKIN,
United States Circuit Judge.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [243]

(Title of Court and Cause—No. 16746.)

Praecipe for Transcript of Record.

To the Honorable WALTER B. MALING, Clerk of the Above-entitled Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court

of Appeals for the Ninth Circuit, pursuant to a writ of error allowed in the above-entitled cause, and to include in such transcript the following papers, to wit:

1. Complaint.
2. Answer of defendants.
3. Trial stipulation, filed March 12, 1923.
4. Minute order, March 12, 1923, allowing amendment to answer.
5. Amendment to answer.
6. Minute order, March 12, 1923, denying defendants' motion for nonsuit.
7. Findings of fact and conclusions of law.
8. Judgment order.
9. All stipulations and orders extending time to serve and tender defendants' bill of exceptions.
10. Stipulation and order waiving bonds on allowance of writ of error. [244]
11. Petition for writ of error.
12. Assignment of errors.
13. Order allowing writ of error.
14. Writ of error.
15. Citation on writ of error.
16. This praecipe.
17. Clerk's certificate to transcript.

Please consolidate the transcript in this case with that in suit No. 16,741, entitled A. Levy & J. Zentner Company, a Corporation, Plaintiff, v. Northern Pacific Railway Company, et al., Defendants.

Dated: At San Francisco, California, this 3d day of January, 1924.

HENLEY C. BOOTH,
ELMER WESTLAKE,
JAMES E. LYONS,
Attorneys for Defendants.

[Endorsed]: Filed Jan. 14, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [245]

(Title of Court and Cause—No. 16746, No. 16694, No. 16741.)

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing two hundred and forty-five (245) pages, numbered from 1 to 245, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled causes, in the office of the clerk of said Court, and that the same constitute the return to the annexed writs of error.

I further certify that the cost of the foregoing return to writs of error is $160.75; that said amount was paid by the defendants, and that the original writs of error and citations issued in said causes are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 13th day of February, A. D. 1924.

[Seal] WALTER B. MALING,
Clerk of the United States District Court for the Northern District of California. [245½]

(Title of Court and Cause—No. 16741.)

Writ of Error.

United States of America,—ss.

The President of the United States of America, to the Honorable, the Judge or Judges of the Southern Division of the District Court of the United States for the Northern District of California, Second Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment and plea which is in the said District Court before you, at the March, 1923, term thereof, wherein Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, are plaintiffs in error, and A. Levy & J. Zentner Company, a corporation, is defendant in error, and wherein said A. Levy and J. Zentner Company, a corporation, was plaintiff and said Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, were defendants, a manifest error has happened to the damage of the said Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, the plaintiffs in error as by their complaint appears:

And we being willing that error, if any hath been, should be [246] duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, where said Court is sitting on the 1st day of February, 1924, and within thirty (30) days from the date hereof, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 2d day of January, 1924.

[Seal] WALTER B. MALING,
Clerk of the Southern Division of the District Court of the United States for the Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by:

FRANK H. RUDKIN,
United States Circuit Judge. [247]

Service of the within writ is hereby acknowledged this 3d day of January, 1924.

ALFRED J. HARWOOD,
Atty. for Deft. in Error.

[Endorsed]: Filed Jan. 4, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [247½]

Return to Writ of Error (No. 16741).

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk United States District Court, in and for the Northern District of California. [248]

(Title of Court and Cause—No. 16741.)

Citation on Writ of Error.

United States of America,
Northern District of California,—ss.

The President of the United States, to A. Levy and J. Zentner Company, a Corporation, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco in the State of California on the 1st day of February, 1924, being within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Southern Division of the United States District Court for the Northern District of California, Second Division, wherein Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. [249]

WITNESS the Honorable FRANK H. RUDKIN, United States Circuit Judge for the Ninth Circuit, this 2d day of January, 1924.

FRANK H. RUDKIN,
United States Circuit Judge. [250]

Service of the within citation is admitted this 3d day of Jan., 1924.

ALFRED J. HARWOOD,
Attorney for Deft. in Error.

[Endorsed]: Filed Jan. 4, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

(Title of Court and Cause—No. 16694.)

Writ of Error.

United States of America,—ss.

The President of the United States of America, to the Honorable, the Judge or Judges of the Southern Division of the District Court of the United States for the Northern District of California, Second Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment and plea which is in the said District Court before you, at the March, 1923, Term thereof, wherein Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, are plaintiffs in error, and Joseph Moyse and A. P. Jacobs, copartners doing business under the firm name and style of Jacobs, Malcolm & Burtt are defendants in error, and wherein said Joseph Moyse and A. P. Jacobs, copartners doing business under the firm name and style of Jacobs, Malcolm & Burtt were plaintiffs and said Northern Pacific Railway Company, a corporation, and Southern Pacific Company,

a corporation, were defendants, a manifest error has happened to the damage of the said Northern Pacific Railway Company, a [251] corporation, and Southern Pacific Company, a corporation, the plaintiffs in error as by their complaint appears:

And we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, where said Court is sitting on the 1st day of February, 1924, and within thirty (30) days from the date hereof, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 2d day of January, 1924.

[Seal] WALTER B. MALING,
Clerk of the Southern Division of the District Court of the United States for the Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by:

FRANK H. RUDKIN,
United States Circuit Judge. [252]

Service of the within writ is hereby acknowledged this 3d day of January, 1924.

ALFRED J. HARWOOD,
Attorney for Deft. in Error.

[Endorsed]: Filed Jan. 4, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Return to Writ of Error (No. 16694).

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

WALTER B. MALING,
Clerk United States District Court, in and for the Northern District of California. [253]

(Title of Court and Cause—No. 16694.)

Citation on Writ of Error.

United States of America,
Northern District of California,—ss.

The President of the United States of America, to Joseph Moyse and A. P. Jacobs, Copartners Doing Business Under the Firm Name and Style of Jacobs, Malcolm & Burtt, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 1st day of February, 1924, being within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Southern Division of the United States District Court for the Northern District of California, Second Division, wherein Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, plaintiffs in error, as in the said writ of error mentioned, should not be corrected, [254] and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable FRANK H. RUDKIN, United States Circuit Judge for the Ninth Circuit, this 2d day of January, 1924.

FRANK H. RUDKIN,
United States Circuit Judge. [255]

Service of the within citation is admitted this 3d day of Jan. 1924.

ALFRED J. HARWOOD,
Attorney for Deft. in Error.

[Endorsed]: Filed Jan. 4, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

(Title of Court and Cause—No. 16746.)

Writ of Error.

United States of America,—ss.

The President of the United States of America, to the Honorable, the Judge or Judges of the Southern Division of the District Court of the United States for the Northern District of California, Second Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment and plea which is in the said District Court before you, at the March, 1923, Term thereof, wherein Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, are plaintiffs in error, and A. W. Knox is defendant in error, and wherein said A. W. Knox was plaintiff and said Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, were

defendants, a manifest error has happened to the damage of the said Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, the plaintiffs in error as by their complaint appears:

And we being willing that error, if any hath been, [256] should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, where said Court is sitting on the 1st day of February, 1924, and within thirty (30) days from the date hereof, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 2d day of January, 1924.

[Seal] WALTER B. MALING,
Clerk of the Southern Division of the District Court of the United States for the Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by.

FRANK H. RUDKIN,
United States Circuit Judge. [257]

Service of the within writ is hereby acknowledged this 3d day of January, 1924.

ALFRED J. HARWOOD,
Attorney for Deft. in Error.

[Endorsed]: Filed Jan. 4, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Return to Writ of Error (No. 16746).

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk United States District Court, in and for the Northern District of California. [258]

(Title of Court and Cause—No. 16746.)

Citation on Writ of Error.

United States of America,
Northern District of California,—ss.
The President of the United States of America,
to A. W. Knox, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 1st day of February, 1924, being within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Southern Division of the United States District Court for the Northern District of California, Second Division, wherein Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, are plaintiffs in error, and you are defendant in error, to show cause if any there be, why the judgment rendered against the said Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. [259]

WITNESS the Honorable FRANK H. RUDKIN, United States Circuit Judge for the Ninth Circuit, this 2d day of January, 1924.

FRANK H. RUDKIN,
United States Circuit Judge. [260]

Service of the within citation is admitted this 3d day of Jan. 1924.

ALFRED J. HARWOOD,
Attorney for Deft. in Error.

[Endorsed]: Filed Jan. 4, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 4201. United States Circuit Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, a Corporation, and Southern Pacific Company, a Corporation, Plaintiffs in Error, vs. A. Levy and J. Zentner Company, a Corporation, Defendant in Error, and Northern Pacific Railway Company, a Corporation, and Southern Pacific Company, a Corporation, Plaintiffs in Error, vs. A. W. Knox, Defendant in Error, and Northern Pacific Railway Company, a Corporation, and Southern Pacific Company, a Corporation, Plaintiffs in Error, vs. Joseph Moyse and A. P. Jacobs, Copartners, Doing Business Under the Firm Name and Style of Jacobs, Malcolm & Burtt, Defendants in Error. Transcript of Record. Upon Writs of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed February 23, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiffs in Error,

vs.

A. LEVY & J. ZENTNER COMPANY, a Corporation,

Defendant in Error.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiffs in Error,

vs.

A. W. KNOX,

Defendant in Error.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiffs in Error,

vs.

JOSEPH MOYSE and A. P. JACOBS, Copartners Doing Business Under the Firm Name and Style of JACOBS, MALCOLM & BURTT,

Defendants in Error.

Stipulation and Order Relative to Consolidation of Records and Briefs.

It is hereby stipulated that the records in the

several causes above-entitled may be consolidated into a single transcript in the court below, for use of the above-entitled court; that but one copy of the consolidated bill of exceptions need be incorporated in said consolidated transcript and may be used as the bill of exceptions in each case; and that only one set of briefs need be filed by the attorneys of record herein, covering all three cases.

Dated: At San Francisco, California, this 14th day of January, 1924.

HENLEY C. BOOTH,
ELMER WESTLAKE,
JAMES E. LYONS,

Attorneys for Plaintiffs in Error in Each of said Cases.

ALFRED J. HARWOOD,

Attorneys for Defendants in Error in Each of said Cases.

So ordered.

HUNT,
United States Circuit Judge.

[Endorsed]: No. 4201. (Three Cases Consolidated.) In the United States Circuit Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, a Corporation, and Southern Pacific Company, a Corporation, Plaintiffs in Error, vs. A. Levy & J. Zentner Company, a Corporation, Defendants in Error. Northern Pacific Railway Company et al., Plaintiffs in Error, vs. A. W. Knox, Defendant in Error. Northern Pacific Railway Company et al., Plaintiffs in Error, vs. Joseph Moyse et al., Defendants in Error. Stipulation and

Order Relative Consolidation of Records and Briefs. Filed Feb. 23, 1924. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 4201.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, et al.,

Plaintiffs in Error,

vs.

A. LEVY & J. ZENTNER COMPANY, a Corporation, et al.,

Defendants in Error.

Stipulation and Order Re Printing Transcript.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective attorneys of record, that in printing the transcript of record on writs of error herein the caption, title, and clerk's endorsements of filing of pleadings, papers, and other formal matters, and all of the exhibits attached to the bill of exceptions, shall be omitted, except that each pleading and document so printed shall be identified by the number in the court below of the action to which the same relates.

Dated this 8th day of March, 1924.

H. C. BOOTH,
ELMER WESTLAKE,
JAMES E. LYONS,
Attorneys for Plaintiffs in Error.
ALFRED J. HARWOOD,
Attorney for Defendants in Error.

So ordered.

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: No. 4201. In the United States Circuit Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, a Corporation, et al., Plaintiffs in Error, vs. A. Levy & J. Zentner Company, a Corporation, et al., Defendants in Error. Stipulation and Order Re Printing Transcript. Filed Mar. 10, 1924. F. D. Monckton, Clerk.

No. 4201

United States

Circuit Court of Appeals

For the Ninth Circuit

2

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation, *Plaintiffs in Error,*

vs.

A. LEVY and J. ZENTNER COMPANY, a corporation, *Defendant in Error,*

and

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation, *Plaintiffs in Error,*

vs.

A. W. KNOX, *Defendant in Error,*

and

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation, *Plaintiffs in Error,*

vs.

JOSEPH MOYSE and A. P. JACOBS, Copartners doing business under the firm name and style of JACOBS, MALCOLM & BURTT, *Defendants in Error.*

Opening Brief for Plaintiffs in Error.

HENLEY C. BOOTH,
JAMES E. LYONS,
ELMER WESTLAKE,
65 Market St., San Francisco, Cal.,
Attorneys for Plaintiffs in Error.

INDEX

TABLE OF CASES CITED

No. 4201

United States

Circuit Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation, *Plaintiffs in Error,*

vs.

A. LEVY and J. ZENTNER COMPANY, a corporation, *Defendant in Error,*

and

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation, *Plaintiffs in Error,*

vs.

A. W. KNOX, *Defendant in Error,*

and

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation, *Plaintiffs in Error,*

vs.

JOSEPH MOYSE and A. P. JACOBS, Copartners doing business under the firm name and style of JACOBS, MALCOLM & BURTT, *Defendants in Error.*

OPENING BRIEF FOR PLAINTIFFS IN ERROR

Statement of the Case.

Three separate complaints were filed by defendants in error against plaintiffs in error in the Southern Division of the District Court of the United States

for the Northern District of California, Second Division, to recover the difference between the rates applicable from Kennewick, Washington, to certain stations in California, and the rates assessed upon certain shipments of potatoes from certain points claimed to be intermediate between Kennewick and the same points of destination. Some shipments moved from branch line points, as hereinafter stated. Each complaint was based upon the theory that the rates from the intermediate points should and could not exceed the rates from Kennewick, because no application had been made to the Interstate Commerce Commission for relief from the provisions of the long and short haul clause of the Fourth Section of the Interstate Commerce Act. There was no allegation, and no effort to prove, that any of the plaintiffs or their assignors had sustained any damage by reason of the assessment of the higher rates from the intermediate points. It was the theory of the plaintiffs that, in the absence of such relief from the provisions of the Fourth Section, they were entitled as a matter of law to the difference between the lower rates from Kennewick and the higher rates from the intermediate points.

As to the branch line points, it was the theory of the plaintiff that the rate from Kennewick should be held as maximum at the junctions of the branch lines with the main lines, adding to such maximum rate the local rate from the branch line point to the junction, and that the complainants were entitled to

the difference between the sum of those two rates and the rate from Kennewick.

It was the position of the defendants in the court below—

First, that allegation and proof of damage are essential to recovery, even though the court had jurisdiction of the subject of the action;

Second, that the court had no jurisdiction of the subject of the action, and that such jurisdiction was vested solely in the Interstate Commerce Commission;

Third, that any existing Fourth Section departures were fully protected by applications filed with, and orders issued by, the Interstate Commerce Commission;

Fourth, that branch line points did not come within the inhibition of the provisions of the Fourth Section.

The *Levy & Zentner Company* case above referred to was numbered 16741 in the court below; the *Knox* case was numbered 16746, and the *Moyse* case numbered 16694.

There was a fourth case brought by Moyse and Jacobs which was numbered 16693, but judgment in that case was rendered *against* the plaintiffs be-

cause of the bar of the statute of limitations under the decision of the Supreme Court of the United States in *Kansas City Southern R. Co. v. Wolf,* 261 U. S. 133. The plaintiffs in No. 16693 have accepted the decision, no appeal having been taken.

All four cases were consolidated for trial in the court below and Nos. 16741, 16746 and 16694 have, by stipulation and order of court, been consolidated in one record before this Court.

The decision of the lower court (pages 26 to 30 of the transcript of the record), is to the effect,

First, that the departures from the Fourth Section were not protected by applications filed with, or orders issued by the Interstate Commerce Commission;

Second, That the complainants were not bound to first seek relief from the Commission;

Third, That in so far as the points on spur lines are concerned, "for all substantial and practical rate-making purposes they are on the 'same line or route in the same direction' as Kennewick, and a distance 'shorter being included within the longer distance,' within the intent and meaning of Sec. 4 of the Act;"

Fourth, That complainants made out a prima facie case of damage by proving that a lower rate was in

existence from the farther distant point, the language of the trial judge's decision being as follows:

> "That plaintiffs have been damaged and at least to the extent of the excess of the charges over the Kennewick charge, is settled by *Davis v. Parrington, supra,* (281 Fed. 14). However defendants violate the statute by tariffs filed and published, it will be presumed that in the lesser charge for the long haul they have at least reasonable compensation; and hence, obviously the greater charge for the short haul is unreasonable and damaging to the extent of the excess at the very least. This affords a rule valid and sound in principle, shifting to defendants the burden of evidence to rebut and lessen this *prima facie* proof of damage."

In the *Levy & Zentner Company case,* No. 16741, the judgment was for $3,855.95, together with $600 attorney's fees, and costs; in 16746 the judgment was for $8,078.95, together with $1100 attorney's fees, and costs; and in 16694 the judgment was for $2,-696.32, together with $500 attorney's fees, and for costs of $25.

More specifically stated, the allegations of the complaints in the three cases above mentioned are as follows:

Levy & Zentner Company v. Northern Pacific Railway Company, No. 16741: The complaint in this case was filed June 17, 1922, by A. Levy and J. Zentner Company, a corporation, as plaintiff,

against the Northern Pacific Railway Company and the Southern Pacific Company. It is alleged that between October 26, 1921, and March 11, 1922, the plaintiff shipped 68 carloads of potatoes from Harrah, Wapato, Toppenish, Sunnyside and Outlook, Washington, to San Francisco, Modesto, Stockton, San Jose, Porterville and Merced, California, upon which the rates charged were in excess of those from Kennewick, a more distant station, to said points of delivery.

Joseph Moyse, etc., v. Northern Pacific Railway Company, et al, No. 16694: The plaintiffs in this case were Joseph Moyse and A. P. Jacobs, copartners doing business under the firm name and style of Jacobs, Malcolm & Burtt. The defendants were the Northern Pacific Railway Company and the Southern Pacific Company. It is alleged that between January 14th and December 12th, 1917, and between March 26, 1920, and February 1, 1922, the plaintiffs and their assignor shipped 51 carloads of potatoes from Yethanot, Moxee, Wapato, Toppenish, Mabton, Yakima, Sunnyside, Nass, Satus, Farron, Outlook, Zillah, Harrah, Ashue and Cowiche, all in the State of Washington, to San Francisco, Oakland, Stockton and San Jose, in the State of California, the points of origin being on the line of the Northern Pacific, and those of destination on the line of the Southern Pacific. It is stated that the rates collected for the transportation of these shipments exceeded the rate from Kennewick, Washington, to

the point of destination, Kennewick being further distant from the points of destination than said points of origin. The shipments during 1917, it is alleged, were made by Jacobs, Malcolm & Burtt, a corporation, which paid the charges, and those made during 1920, 1921 and 1922 were made by the copartnership of Jacobs, Malcolm & Burtt. An assignment of the claim from the corporation to the copartnership is also set forth.

Knox v. Northern Pacific Railway Company, No. 16746: The complaint in this case was filed June 30, 1922. This action is brought by A. W. Knox, plaintiff, as assignee of the shippers hereinafter mentioned, against the Northern Pacific Railway Company and the Southern Pacific Company. The complaint contains four separate causes of action. In the first cause of action it is alleged that between March 10, 1920, and March 19, 1922, Walter A. Perry Company, a copartnership, shipped 97 carloads of potatoes from Grandview, Toppenish, Outlook, Mabton, Nass, Sunnyside, Parker, Midvale, Phillips, Wapato, Ashue, Satus, Harrah, Cowiche, Yakima and Selah, in the State of Washington, to Sacramento, Stockton, Oroville, Woodland, Yuba, Lodi, Colusa, Chico, Modesto, Suisun, Roseville, Willows, Turlock, Martinez, Oakland and San Francisco, in the State of California. The rates charged, it is alleged, exceeded those from Kennewick, a more distant point. The amount demanded in this cause of action is $5,150.16. In the second cause of action

it is alleged that between January 10, 1921, and November 3, 1921, John Demartini Company, a corporation, shipped five carloads of potatoes from Toppenish and Sunnyside, Washington, to Sacramento, Stockton and San Francisco, California, the rates upon which exceeded those from Kennewick, a more distant point. The amount claimed here is $258.02. In the third cause of action plaintiff alleges that between November 2, 1921, and February 24, 1922, L. Scatena & Company—A. Galli Fruit Company, Consolidated, (a corporation), shipped fourteen carloads of potatoes from Ashue, Toppenish, Wapato and Grandview, Washington, to San Francisco and Oakland, California, upon which the rates charged were in excess of those from Kennewick, a more distant point. The amount claimed upon these shipments is $829.91. By the fourth cause of action it is alleged that between November 14, 1920, and November 22, 1921, F. M. Burnham shipped seventeen carloads of potatoes from Outlook, Sunnyside and Selah, Washington, to San Francisco, California, upon which the rates charged were in excess of those from Kennewick, a more distant point. The amount claimed in this cause of action is $917.04. The total amount for which judgment is demanded in this action is $7,155.15, with interest and costs, and counsel fees in the sum of $2,000.00. In each of these causes of action plaintiff states that the claim of each shipper was assigned to him.

In each of these actions the complaint stated that at the time of the movement of the shipments in question a lower rate obtained upon potatoes from Kennewick, Washington, to points of destination in California, than the rates which were charged upon the shipments that actually moved, and it is also stated that the stations of origin were all intermediate between Kennewick and the points of destination; that it is a longer distance from Kennewick to the points of destination than it is from the intermediate stations to such destinations, the shorter being included within the longer distance.

Summary of the Issues

From the foregoing statement, it appears that the issues involved are as follows:

1. That defendants in error cannot recover because they neither alleged nor proved damage.

2. That the court had no jurisdiction of any of these actions because:

(a) Prior to the commencement of these actions, no application was made to the Interstate Commerce Commission for the reparation claimed;

(b) Exclusive jurisdiction to primarily hear these claims and award damages, is vested in the Interstate Commerce Commission.

3. That the alleged violations of the Fourth Section of the Interstate Commerce Act have been protected, and the carriers relieved therefrom, by prop-

er applications filed with the Interstate Commerce Commission.

4. That the points of origin situated on branch lines of the Northern Pacific Railway, are not intermediate points within the meaning of the Fourth Section of the Interstate Commerce Act.

ARGUMENT

1. These Cases are Clearly Ruled by Davis, Presidential Agent, v. The Portland Seed Co., (and Three Cognate Cases) Decided by the Supreme Court, April 7, 1924, in Which That Court Reversed the Decision of this Court Which Was Relied on by Judge Bourquin in the Instant Cases. Reversal is Required Because in the Cases Now Under Consideration None of the Plaintiffs Pleaded Or Proved Pecuniary Injury Or Damage.

We confidently believe that the plaintiffs in error would not have been put to the necessity of resorting to this court for relief if the Supreme Court had handed down its decision in *Davis, Presidential Agent v. The Portland Seed Company* and the three other related cases which were decided on April 7, 1924, a copy of the opinion in which is printed at the end of this brief as Exhibit No. 4, before Judge Bourquin on May 30, 1923 (Record, pp. 26-30) ordered judgment for the plaintiffs below.

As the record stood when Judge Bourquin decided the three cases now here on writs of error he found that the carriers had charged for interstate

movements of freight more for the lesser than for the greater distance over the same line or route in the same direction without obtaining relieving orders from the Interstate Commerce Commission. That they had such relieving orders is asserted by us on these writs of error and discussed under Subdivision 3 of this argument. But Judge Bourquin, finding that there were no such orders, or that if such attempt had been made it was ineffectual, held (Record, p. 28):

> "The plaintiffs are entitled to recover same in so far as barred by the limitations of the Act, viz., to recover upon all items of shipments made within two years prior to complaints filed herein. They were not bound to first seek relief from the Commission, but could as they did proceed to assert their right herein.

See Davis v. Parrington, 281 Fed. 14."

He further held (Record, p. 30):

> "That plaintiffs have been damaged and at least to the extent of the excess of the charges over the Kennewick charge, is settled by Davis *v.* Parrington, supra.
>
> "However defendants violate the statute by tariffs filed and published, it will be presumed that in the lesser charge for the long haul they have at least reasonable compensation; and hence, obviously the greater charge for the short haul is unreasonable and damaging to the extent of the excess at the very least.

> "This affords a rule valid and sound in principle, shifting to defendants the burden of evidence to rebut and lessen this prima facie proof of damage."

In the decision by this court in *Davis v. Parrington,* June 5, 1922 (281 Fed. 10) there were also considered the suits, on the law side of the court, of *San Francisco & Portland Steamship Co. v. Parrington* and *Davis, as Agent, v. The Portland Seed Company,* and this court held that:

> "Inasmuch as no permission from the Interstate Commerce Commission was obtained by the carriers concerned in the present cases, the greater charge to the shorter point was prohibited by the statute referred to. It was an illegal rate, unless the effect of failing to obtain the consent of the Commission can be avoided by regarding the question as purely administrative, to be submitted first to the Interstate Commerce Commission before appeal lies to the judicial power."

After discussing the question of whether the violations of the long and short haul clause were permitted by order of the Commission or by the operation of orders of the Director General, this court, as fairly summarized by paragraph 9 of the syllabus, holds:

> "In actions by shippers to recover excessive freight rates collected in violation of the long and short haul clause of Interstate Commerce Act, Sec. 4 (Comp. St. Sec. 8566) it was proper

> to measure the damages by the difference between the rate collected for the shorter haul and the tariff rate for the longer haul."

Therefore it is evident that the learned District Judge felt constrained to follow the unanimous opinion of this court and to adopt the same rule for measuring damage in the instant cases.

But the defendant in The Portland Seed Company case was allowed certiorari by this court and the defendants in the other two cases sued out writs of error to the Supreme Court and also the Great Northern Railway Company, against which a similar suit had been decided by the Supreme Court of Minnesota, obtained certiorari from the Supreme Court, and those four cases, as we have shown, were decided by that court on April 7th, 1924, by the opinion, a copy of which is attached hereto as Exhibit 4.

In reversing the judgments the Supreme Court has clearly held that the rates charged and collected, if they were rates evidenced by tariffs, were the rates which should have been collected notwithstanding that another tariff provided a lesser rate from or to a more distant point over the same line or route in the same direction, and notwithstanding the fact that the railroad carrier had not obtained permission from the Interstate Commerce Commission under the amended 4th Section to charge more for the lesser distance.

And it is further most clearly held that "mere publication of the forbidden lower rate did not wholly efface the higher intermediate one from the schedule and substitute for all purposes the lower one, as a supplement might have done, without regard to the reasonableness or unreasonableness of either."

The shipper's argument that under the long and short haul clause the lower published rate from the more distant point became the maximum which the carrier could charge for the shipment from the intermediate point notwithstanding the higher published rate therefor, and that the difference amounted to an illegal exaction recoverable without other proof of actual damage and without regard to the intrinsic reasonableness of either rate, was found by the Supreme Court to be without merit.

Now applying the reasoning of the Supreme Court opinion of April 7, 1924, to the instant cases we find from the testimony of F. W. Gomph, beginning at page 72 of the record, and that of M. A. Cummings, beginning at page 80 of the record, that the rates actually charged and collected were rates which were tariff rates on file for the service performed, even though there may have been and doubtless were lesser rates from the more distant point over the same line or route in the same direction.

We further find that the three complaints in the instant cases are all barren of any allegation that the plaintiff or the plaintiff's assignor suffered any pecuniary injury or damage by the exactions complained of. Each of the three complaints is based on the theory of a recovery of a straight overcharge.

There were but two witnesses for the plaintiffs, Mr. A. J. Harwood, plaintiff's counsel, whose testimony begins at page 59 of the record, and Mr. A. W. Knox, whose testimony begins at page 88 of the record. Neither of these witnesses attempted to show that the plaintiffs or the plaintiffs' assignors had suffered any pecuniary loss or had been damaged to the extent of the difference between the higher and the lower rate, or to any other extent. Nor were there any stipulations on that subject. On this branch of the case it is therefore respectfully submitted that plaintiffs in error are entitled to a reversal.

2. The Court Has No Jurisdiction of These Actions.

(*a*) *The Nature of the Action.*

The claims of defendants in error are based upon a violation of Section 4 of the Interstate Commerce Act. As it existed from the amendment of June 18, 1910, until February 28, 1920, when it was again amended by the Transportation Act, 1920, this Section read as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance; *Provided, however,* That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this saction; *Provided, further,* That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission."

By the amendment of February 28, 1920, this section provided:

> "(1) That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail line or route is, because of such circuity, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges

to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul or the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *And provided further,* That rates, fares or charges existing at the time of the passage of this amendatory Act by virtue of orders of the Commission or as to which application has theretofore been filed with the Commission and not yet acted upon, shall not be required to be changed by reason of the provisions of this section until the further order of or a determination by the Commission."

Section 9 of the Interstate Commerce Act authorizes an action to be brought by any person claiming to be damaged because of a violation of the Interstate Commerce Act. This Section, so far as material, provides as follows:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which

one of the two methods of procedure herein provided for he or they will adopt."

(*b*) *Where the Determination of an Administrative Question is Involved Recourse Must First Be Had to the Interstate Commerce Commission.*

Although Section 9 in general terms permits a plaintiff at his election to institute proceedings before either the Commission or the courts for the recovery of damages, nevertheless this right is subject to an important limitation. Wherever the nature of the claim is such that it requires the exercise of the Commission's administrative functions, then a claimant must first apply to the Commission before instituting an action in the courts. Thus, if it is contended that a rate specified in a tariff duly filed with the Commission is unreasonably high, resulting in damage to the claimant, it is necessary that he have the question of the reasonableness of the rate determined in the first instance by the Commission, and should that tribunal find that the rates were unreasonable and award reparation, then, and not until then, may the claimant apply to the courts. This is so in order to uphold the integrity of the tariffs and to secure uniformity of treatment to all shippers. Were the rule otherwise, the reasonableness of rates, under Section 1 of the Interstate Commerce Act, would be a matter to be determined by innumerable juries or courts throughout the country and the varying conclusions upon the same

state of facts would unquestionably result in discrimination and undue prejudice to the shippers at large.

> *Texas & Pacific R. R. Co. v. Abilene Cotton Oil Co.,* 204 U. S. 426.

And the same rule has been applied in cases involving questions of discrimination alleged to be in violation of the Interstate Commerce Act.

> *Robinson v. B. & O. R. R. Co.,* 222 U. S. 506.

Indeed, the same court has gone so far as to hold that where the construction of a tariff involves the question whether or not it is applicable to certain commodities, this question of fact should first be determined by the Commission before an action can be brought in the courts.

The Court said:

> "There is no room for controversy that the law required a tariff and, therefore, if there was no tariff on crossties, the making and filing of such a tariff conformably to the statute was essential. And it is equally clear that the controversy as to whether the lumber tariff included crossties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the Statute. Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that for the preservation of the uniformity which it was the

> purpose of the Act to Regulate Commerce to secure, the courts may not, as an original question, exert authority over subjects which primarily come within the jurisdiction of the Commission." (Citing cases).
>
> *Texas & Pacific Railway v. American Tie Co.,* 234 U. S. 138, 146.

In a later case, there was involved the right of a shipper to recover from a carrier the amount expended for the construction of inside doors or bulkheads necessary to properly protect carload shipments of grain. The shipper sued in the State Court, claiming that the carrier had failed to perform its common law duty to furnish adequate cars. No provision was made in the tariff for the payment of such an allowance. In holding that as to interstate shipments the shipper must in the first instance apply to the Commission, the court pointed out that in order to decide this controversy it would be required to investigate many intricate facts of transportation with their consequent effect upon the tariffs, and it decided that this case concerned a rate making problem, administrative in its nature, which, in order to secure uniformity and prevent discrimination, should first be determined by the Interstate Commerce Commission before being submitted to a court.

> *Loomis v. Lehigh Valley R. R. Co.,* 240 U. S. 43.

That an administrative question is involved in the instant cases, we submit can not well be questioned. Here, it appears that applications have been filed for relief from the operation of the Fourth Section, and that the rates have long been published in reliance upon such applications. In order to determine whether the carriers were warranted in so doing, it is necessary to consider the scope of the applications, the reasons which impelled the carriers to seek relief from the provisions of the Fourth Section, such as water or carrier competition, and also the volume or level of the rates, that is to say, whether they are reasonable at the intermediate points, or otherwise. All of these questions are peculiarly administrative in their character and should, therefore, be considered alone by the Commission, and do not fall within the province of the courts to determine.

That the court has no jurisdiction of these actions is, we believe, conclusively established by the decision of the Supreme Court of the United States in the cases Nos. 114, 122, 123 and 209, under date of April 7, 1924, hereinbefore referred to. The title of the first of those four cases is *James C. Davis, as Agent, etc., petitioner, v. The Portland Seed Company,* No. 114, on writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. That case definitely holds that the exaction of a higher rate from the intermediate point than that applicable to the further distant point does not con-

stitute "an overcharge illegally exacted and recoverable as money had and received and that a condition prerequisite to recovery is proof of actual damage."

The Supreme Court in The Portland Seed Company opinion just referred to repudiates the contention of claimants' attorneys in the four cases decided by that opinion, "That the sum charged above the Pecos rate (*the rate from the more distant point*) amounted to an illegal exaction recoverable without other proof of actual damage or without regard to the intrinsic reasonableness of either rate."

It is our position that there can be no proof of actual damage without a finding as to the intrinsic reasonableness of the rate from the intermediate point, or that there has been undue discrimination against the intermediate point by the exaction of a higher rate therefrom than applied to the further distant point. If this be true the court has no jurisdiction to award reparation, because it has no power to determine the reasonableness of the rate from the intermediate point actually collected, nor has it any power to determine whether or not there was any undue discrimination in the charging of a higher rate from the intermediate point than applied from the further distant point.

That the court has no power to determine the reasonableness of the rate from the intermediate point

or to pass upon the question of discrimination, is settled by a long line of decisions of the Supreme Court of the United States, among which are the following:

Texas & Pacific R. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 440;
B. & O. R. R. Co. v. U. S., 215 U. S. 481, 493-4;
Robinson v. B. & O. R. R. Co., 222 U. S. 506, 509-10;
Mitchell Coal & Coke Co. v. Pennsylvania R. R. Co., 230 U. S. 247, 255;
Minnesota Rate cases, 230 U. S. 352-419;
Morrisdale Coal Co. v. Pennsylvania R. R. Co., 230 U. S. 304, 313;
T. & P. R. R. Co. v. American Tie & Timber Co., 234 U. S. 138; 313;
A. T. & S. F. Ry. Co. v. U. S., 232 U. S., 199, 220;
Pennsylvania R. R. Co. v. Puritan, 237 U. S. 121, 131;
Pennsylvania R. R. Co. v. Clark, 238 U. S., 456-69;
Loomis v. Lehigh Valley R. R. Co., 240 U. S., 43, 48-9.

Indeed, in the instant cases there is no allegation in any of the complaints that the rates from the intermediate points or from the points on branch lines were unreasonable or that the charging of a lower rate from the further distant point constituted any discrimination. In short, there is no allegation

of any violation of either Section 1 or Section 3 of the Interstate Commerce Act, or any violation of any provision of the Interstate Commerce Act excepting allegations of a departure from the provisions of Section 4 thereof, so that there was nothing before the court upon which it could properly predicate an award of reparation or judgment of damages in favor of any of the plaintiffs.

3. Any Existing Fourth Section Departures Were Fully Protected by Applications Filed With the Interstate Commerce Commission.

(Note: Figures appearing in parentheses refer to pages of the printed transcript of record in the Circuit Court of Appeals).

(*a*) *Location of points involved.*

By stipulation and order (record pp. 269-270), the original exhibits attached to the bill of exceptions herein were omitted from the printed transcript of record, but such original exhibits were transmitted to the Circuit Court of Appeals. As will be seen from the map introduced (Defendants' Exhibit M), Kennewick and Pasco are situated on the line of the Northern Pacific on opposite sides of the river about 2.7 miles apart (94). As to the shipments involved, the points of origin are situated on the line of the Northern Pacific west of Kennewick. This line runs to Portland and thence the shipments moved over the Southern Pacific to points of destination. It will also appear from this map that the railroad

of the Oregon-Washington Railroad & Navigation Company is the short line from Pasco and Kennewick to Portland.

The station of Moxee is a branch line point nine miles from the main line (58). Yethanot, Farron, Harrah, Ashue and Cowiche are also on branch lines. Yethanot is 2.2 miles from the main line, Farron 8.1 miles, Harrah, 9.5 miles, Ashue 5.2 miles, Cowiche 9.2 miles and Midvale 3 miles from the main line. These points (except Midvale), are on branch lines of the Northern Pacific, all making into the main line south of Kennewick (63). Midvale is on the O.-W. R. R. & N. Railroad, and not on the Northern Pacific.

The distance from Kennewick to North Yakima and Yakima is 87 miles and from Kennewick to Wesley Junction 67 miles (94). The distances from Kennewick, Pasco and the various intermediate points of origin to Portland over the Northern Pacific line and also that from Kennewick to Portland over the O.-W. R. R. & N. Co., the short line, appear in Defendants' Exhibit N. The points of destination are all on the line of the Southern Pacific Company in California.

A map completely depicting the situation was received in evidence as Exhibit 3 and is attached to this brief as Exhibit 1.

(*b*) *The rate situation.*

Copies of the material parts of the defendants' tariffs were introduced to show the rate situation as it existed in 1910 and 1911 when the original applications for relief from the Fourth Section were filed. Testimony was introduced for the purpose of pointing out to the court the method by which these rates were constructed. We shall first deal with the rates from Pasco and Kennewick to Portland and thence to San Francisco. The rates between San Francisco and Portland applicable in connection with shipments of potatoes originating at Kennewick at that time, and later Pasco, are shown in Exhibit F, being Pacific Freight Tariff Bureau Tariff No. 1-A, I. C. C. 62, effective January 15, 1911. Page 47 of this tariff shows in Item 200 that the Class C rate of 16c per 100 pounds applies between Portland and San Francisco upon traffic originating at certain points, including Group 9, on the Northern Pacific. Turning to page 8 of this tariff it will be found that Group 9 includes Pasco, Washington, among other points. From this it appears that the rate of 16c between San Francisco and Portland applies only upon traffic originating at or destined to Pasco.

Page 27, Item 28 of this tariff, in the second clause shows that this 16 cent rate applies at intermediate points not named south of Marysville or Woodland, California, which in this case include the points of destination. By referring to page 46 of this tariff,

we will find the method of arriving at the rates from Portland to Pasco, which are to be added to the San Francisco-Portland rates. The tariff referred to is Northern Pacific Tariff No. 1323-A, I. C. C. No. 4383, introduced in this proceeding as Exhibit J.

On page 13 of the latter tariff will be found among other points, the rates from Kennewick and Pasco to Group 1 points, the same being 14 cents per 100 pounds. These two points of origin are numbered 351 and 352 in the left hand margin. The Kennewick rate is shown as 14 cents, but no rate is shown from Pasco as this item is blank in the column of Group 1 rates. But, under the intermediate application of the tariff found on page 10, Rule 1, the 14 cent rate applies. According to this rule the 14 cent rate applicable at more distant points applies also at Pasco.

Page 6 of this tariff includes in Group 1 the station of Portland which thus indicates that the rates shown from the points on page 13 to Group 1 points apply to Portland. In the extreme right hand column on page 13 appear certain figures which refer to the routes over which these rates apply. Page 21 shows that routes Numbers 1 and 2 comprise the Northern Pacific Railway alone. Therefore, the rates from Kennewick and Pasco, together with the other intermediate points of destination also shown on page 13 apply to Portland over the line of the Northern Pacific.

The combination of the two rates from Pasco and Kennewick to Portland of 14 cents, and from Portland to San Francisco of 16 cents, makes a total rate of 30 cents upon this traffic.

Exhibit J also shows that the rates to Portland from the intermediate points of origin involved in this case are the same as those from Kennewick and Pasco, namely 14 cents per 100 pounds.

According to Exhibit K (S. P. Tariff No. 302, I. C. C. 3270) the rate on potatoes between San Francisco and other California points and Portland is 25 cents per 100 pounds. This will appear on page 23 of this tariff. This rate, it will be noted, is not restricted to cases where traffic originates at or is destined to certain points in Washington, or elsewhere, such as Pasco and Kennewick, as was the case with respect to the 16 cent rate found in Exhibit F. Thus it appears that the through rate from the intermediate points of origin to San Francisco is 39 cents, being made up of a combination of the 14 cent rate to Portland and the 25 cent rate beyond Portland. This exceeds by 9 cents the Pasco combination rate of 30 cents, thus showing that the rate from the intermediate points is higher than the rate from more distant points. In both cases the rates from the points of origin to Portland are the same; the difference occurs in the rates between Portland and San Francisco. Upon the Pasco traffic this is a proportional Class C rate of 16 cents (Exhibit F,

page 47); from the intermediate points traffic moves under a commodity rate of 25 cents (Exhibit K, page 23).

Exhibit G, Supplement 2, P. F. T. B. Tariff No. 1-A, I. C. C. No. 62, effective May 17, 1911, shows that the Pasco rate was extended to Kennewick. This appears at the top of page 2 where Group 9 was changed so as to include Kennewick as well as Pasco and also in the next item this change appears. Since Kennewick is west of Pasco, this would necessarily include Pasco as well because, according to this item, all the points between Kennewick, Washington, and certain points east thereof, viz., Hauser and Larson, Idaho, take rates lower than those from the points of origin involved herein, which are west of Kennewick. This was explained by Mr. Gomph (81).

It was conceded by defendants in error that from the branch line points the rates should include the local rate from the branch line point to the junction point with the main line, which should be added to the rate from the junction point to the point of destination (91, 92). It was also stipulated that the tariffs to which we have referred were filed with the Interstate Commerce Commission (86, 87).

Mr. Cummings testified as to the increase of 25% in the rates which took place upon June 1st, 1918, under the Director General of Railroads' General

Order No. 28 (87, 88), a copy of which was introduced as Defendant's Exhibit L (96). He also described the increase of 25% which took place on Aug. 26, 1920, pursuant to the Interstate Commerce Commission's decision in *Ex Parte* 74, 58 I. C. C. Rep. 220 (88). On January 1, 1922, the rates were reduced 10 per cent (88).

(*c*) *Application for Relief from the Fourth Section.*

After the amendment of June 18, 1910, to the Fourth Section, the Interstate Commerce Commission on October 14, 1910, promulgated an order relative to the filing of applications for relief, specifying, among other things, the form in which they should be made; a copy of this was introduced as Defendant's Exhibit A (75). It will be noted that pursuant to this order the carriers had until February 17, 1911, within which to file their applications. On February 11, 1911, Mr. Gomph, as Agent for the Southern Pacific and the Northern Pacific (his authority was admitted—Tr. 79) filed an application for relief from the provisions of the Fourth Section with respect to the rates between San Francisco and other California points and Pasco, Washington, and to publish rates at Pasco lower than the rates from intermediate points on the Northern Pacific. This was introduced in evidence as defendant's Exhibit B (76), and is attached to this brief as Exhibit 2.

On December 10, 1910, Mr. Gomph, on behalf of these carriers, filed with the Interstate Commerce Commission, an omnibus application for relief from the Fourth Section, which was introduced as Defendant's Exhibit C (77); accompanying this was P. F. T. B. Tariff No. 1, I. C. C. No. 2, which was referred to in the application, and which was introduced as defendant's Exhibit D (77).

On December 10, 1910, Mr. Gomph also filed, on behalf of these carriers another omnibus application which was received in evidence as defendant's Exhibit E; and with it was received, as Exhibit F, P. F. T. B. Tariff No. 1-A, I. C. C. No. 62, which was referred to in the application (77).

The Pasco rate was extended to Kennewick by Supplement No. 2 to P. F. T. B. Tariff No. 1-A, I. C. C. 62, which was received in evidence as defendants Exhibit F (77). Mr. Gomph testified that this was done because the Oregon-Washington Railroad and Navigation Company, which is the short line to Portland, in February 1911, extended its line through Kennewick to North Yakima thereby increasing the competition (77, 78).

On February 3, 1914, the Interstate Commerce Commission promulgated Fourth Section Order No. 3700, a copy of which was introduced in evidence as defendant's Exhibit H (79). Supplement 1 to Fourth Section Order No. 3700, dated June 2, 1920,

was introduced as defendant's Exhibit I (79). This does not modify the original order in any respect material to this case. A copy of Fourth Section Order No. 3700 is attached to this brief as Exhibit 3.

Section 8 of this order reads:

> "Where rates are in effect from or to a point that are lower than rates effective from or to intermediate points, carriers may extend the application of such rates to, or establish rates made with relation thereto at, points on the same line adjacent or in close proximity thereto, provided that no higher rates are maintained from and to points intermediate to the former point and the new point to which the application of the same or relative rates has been extended."

Section 5 also is material. It provides:

> "A longer line or route may reduce the rates in effect between the same points or groups of points to meet the rates of a shorter line or route when the present rates via either line do not conform to the Fourth Section of the Act, under the following circumstances:
>
> (a) Where the longer line is meeting a reduction in rates initiated by the shorter line.
>
> (b) Where the longer line has not at any time heretofore met the rates of the shorter line.

(*d*) *The Applications For Relief From the Provisions of the Fourth Section of the Interstate Commerce Act Were Sufficient in Form to Protect Plaintiffs in Error Pending a Decision Thereon by the Interstate Commerce Commission.*

It is conceded that none of the applications for relief from the Fourth Section, admitted in evidence, has been acted upon by the Interstate Commerce Commission (56). But it is contended that the so-called omnibus applications (Exhibits C and E) were too general in form to protect the carriers.

The Fourth Section of the Interstate Commerce Act as it existed prior to the amendment of 1920 provided in part:

> "That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided further,* that no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission."

The amendment of February 28th, 1920, to this Section, provided in part—

> "*And Provided Further,* that rates, fares or charges existing at the time of the passage of this amendatory act by virtue of orders of the Commission or as to which application has theretofore been filed with the Commission and not yet acted upon, shall not be required to be changed by reason of the provisions of this Section until the further order of or a determination by the Commission."

In considering this Section, it is to be noted that the Commission's *order* authorizing a departure from the long and short haul rule deals with special cases, but nothing is said about the scope of the application, whether it shall be general or in the most detailed form. The section does not prohibit a general application. What the Commission is required to do is to investigate the matter and then issue an order setting forth specifically to what extent the carriers shall be permitted to deviate from the long-and-short-haul rule. Under the construction contended for by counsel, both the application and the order must deal with point to point rates. But, in acting under this section, the Commission has dealt with rate adjustments quite broad in their scope including the rates between all of the points in vast regions of territory. The Interstate Commerce Commission's reports are full of cases where such adjustments have been made. It would appear, therefore, that the term "special cases" as used in the

act contemplates the investigation of a specific situation, whether it includes one or thousands of rates; that it was the purpose of Congress to require the Commission to investigate all of the rates under consideration and not to deal with the situation by orders affecting the country at large, not based upon an investigation of the rate adjustment in question. That there should be an *investigation* by the Commission was the primary requirement of the Statute; the form of the application was not considered important. Congress laid down a general rule for the whole country; the Commission was to administer that rule and to relax the prohibition against violations of the long and short haul rule where the situation, whether involving an individual rate or many rates, would justify such action.

Counsel will no doubt refer to the case of *United States v. Merchants etc., Association,* 242 U. S. 178 as establishing the rule that general applications such as this were not permitted by the law. It was there said at page 187 that the clause in the Fourth Section with respect to the granting of relief in special cases was designed to guard against the Commission issuing general orders suspending the long and short haul clause and to insure action by it separately in respect to particular carriers and only after consideration of the special circumstances existing. This statement was hardly necessary to a decision of the case, which involved the question whether the orders of the Commission granting re-

lief from the Fourth Section were void unless there was an application made to the Commission for the specific purpose of obtaining the relief which was in fact granted by the orders. The court held that the Commission was not required to grant or deny *in toto* the precise relief applied for and that the Commission could grant part of the relief sought. It will be noted that in this case the Commission and the court were considering the entire trans-continental rate adjustment involving thousands of points, scattered throughout a wide territory and nothing was there said as to the invalidity of the application because it covered so wide a scope, or was so general in character.

And in the *Intermountain Rate Cases,* 234 U. S. 476, the court was dealing with this trans-continental rate situation where, it will be noted, the applications covering so wide an expanse of territory were not condemned. The court seems to have recognized that such a situation can best be dealt with as a whole and not in piecemeal. We must conclude, therefore, that the application, whether it be broad in its scope or confined to but one or two points, is sufficient if it deals with a special situation which is presented to the Commission for its investigation.

The Commission had occasion to consider this question in the case of *Southern Furniture Manufacturers Association v. Southern Railway Company,* 25 I. C. C. 379.

In speaking of the application pending before it, the Commission, at page 381 of its report said:

> "This application is one of many general or blanket applications filed by the carriers and in form and substance meets the requirements of the Commission's Fourth Section Order of October 14, 1910, in pursuance of which it was filed. Petitioner questions its legality and sufficiency, pointing to the language of the act, i. e.:
>
> > 'That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of persons and property;'
>
> and contending that this is not such an application as is contemplated by the statute. It should be noted, however, that there is nothing in this Section of the Act prescribing the form, contents or breadth of the application to be filed thereunder. We, therefore, hold that this application is sufficient for the purposes for which it was filed."

The Commission has likewise, in its annual reports, referred to the general character of the applications filed for relief from the provisions of the amended Fourth Section and it has at no time condemned this practice.

In its report for the year 1911, at page 20, appears the statement:

> "Previous to February 17, 1911, 5,030 applications for relief under the Fourth Section were filed; since that date 693 additional applications have been made. Many of these applications are exceedingly voluminous and intricate, involving thousands of rates and many different situations. * * *
>
> Under this holding it is the duty of the Commission to investigate every application filed and to determine the issue of fact presented. Each application becomes a formal complaint—in fact, many applications resolve themselves into numerous complaints since one application may present several different issues."

As in its report for 1912, at page 17, the Commission says:

> "Many of the original applications (filed immediately after the amendment of 1910) were very comprehensive in their nature, covering practically all traffic and points in the carrying trade of which the applicants participated."

Again, in its annual report for 1913, at pages 25 and 26, the Commission says:

> "In some instances these applications (for relief under the Fourth Section) have reference only to particular situations, involving peculiar circumstances, while in others they include all rates published in particular tariffs which in any manner contravene the provisions of this

> section. In still other instances, single applications were filed on behalf of the carriers asking relief as to all rates in contravention of this section contained in all tariffs in which they participate."

The Commission then refers to special applications filed by the carriers and continues:

> "These applications have been responded to by special orders, most of which are necessarily temporary in character and automatically expire when the Commission acts upon the general applications *which protect the rates to which the changes are related.*" (Emphasis ours.)

In its annual report for the year 1922 the Commission, at page 48, refers to the fact that out of the 5031 applications filed pursuant to the amendment of 1910, 1767 yet remain undisposed of, which, for the most part, are general in character.

Thus it will be seen that the precise tribunal charged with the administration of this law has, for a period of more than ten years, acted upon applications such as those involved here upon the assumption that they are valid and are sufficient to protect the carrier in the violation of the long and short haul rule until the Commission investigates and finally determines the matter. We believe that great weight should be given to this practical construction of the Act by the Interstate Commerce Commission.

It is said by a well recognized authority:

> "It is a well settled rule that the contemporaneous construction of a statute by those charged with its execution and application, especially where it has long prevailed, while not controlling, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous. The courts are especially reluctant to overturn a long standing executive or departmental construction where great interests have grown up under it and will be disturbed or destroyed by the announcement of a new rule, or where parties who have contracted with the government upon the faith of such construction will be prejudiced."
>
> *25 Rul. Case Law,* p. 1043,
> *36 Cyc.,* 1140.

And in considering a conference ruling of the Interstate Commerce Commission, it was said:

> "Surely the conclusions of the body delegated by Congress to enforce the statute are entitled to great weight in a case like the present. The rulings of administrative bodies charged with the enforcement of certain statutes have very generally been given careful consideration and credit by the courts."
>
> *Chicago G. W. R. Co. v. Postal Tel.-Cable Co.,* 245 Fed. 592, 600.

In construing the Safety Appliance Act, with reference to the necessity of maintaining an automatic

coupler between the engine and the tender, the court said that while the custom of the railroads not to do so could not justify a violation of the statute, nevertheless, "that custom, having the acquiescence of the Interstate Commerce Commission, is persuasive of the meaning of the statute." After referring to the Commission's order, the court held that the use of such a coupling device between the engine and the tender was not required by the law.

> *Pennell v. Phil. & R. Ry.,* 231 U. S. 675, 680.

As we have pointed out, the practical construction of Section 4, given by the Commission, has prevailed for many years, and should not now be overruled.

In addition to the reasons we have urged in support of the omnibus applications, it would seem that the proviso contained in the amendment of 1920, set forth above, protects the carriers. The statute says:

> "That rates * * * existing at the time of the passage of this amendatory act by virtue of orders of the Commission or as to which *application has theretofore been filed with the Commission and not yet acted upon,* shall not be required to be changed by reason of the provisions of this section until the further order of or a determination by the Commission." (Emphasis supplied.)

From this, it would appear that it was the intention of Congress that all applications filed before the amendment of February 29, 1920, became effective, were recognized as valid and sufficient to protect the carrier until the Commission eventually passed upon them. It must be assumed that Congress was familiar with the annual reports of the Commission and its decisions respecting the validity of such general applications and that this statute was intended to and did recognize the sufficiency of all applications, whether general or special, theretofore filed with the Commission for relief from the Fourth Section.

The violation existing at Pasco was covered by the application filed February 11, 1911 (Exhibit B). This specifically related to Pasco and there can be no question as to its sufficiency in form.

The Fourth Section specifically provides that a violation covered by an application is valid until passed upon by the Commission, and this has been expressly decided by the Interstate Commerce Commission.

Appalachia Lumber Co. v. L. & N. R. Co., 25 I. C. C. Rep. 193, 197;

City of Clarksdale v. Illinois Central Railroad Company, 45 I. C. C. Rep. 109, 110;

Aetna Explosives Co. v. Director General, 53 I. C. C. Rep. 140;

Schlitz Brewing Co. v. Director General, 55 I. C. C. Rep. 610.

As we have previously stated, the Pasco rate was extended to Kennewick, effective May 17, 1911, pursuant to Supplement No. 2 of Tariff 1-A, introduced here as Exhibit G. This was done primarily to meet the competition of the O.-W. R. & N. Railroad, the short line to Portland, which extended its line through Kennewick to North Yakima (77 to 79). It was defendant's contention that the violation of the long and short haul provision at Kennewick was justified under Fourth Section Order No. 3700 (Exhibit H). Section 5, as we have shown, permits the longer line to reduce its rates to meet those of a shorter line when the existing rates of either line are not in conformity with the Fourth Section, in cases where the longer line is meeting a reduction effected by the shorter line. That was the case here. The Northern Pacific, the long line to Portland, already had Fourth Section relief at Pasco to meet the competition of the O.-W. R. & N. and when the latter extended its line to Kennewick, the Northern Pacific met this competition by reducing the rate at Kennewick to a point lower than that applicable from intermediate points. This was accomplished by extending the Pasco rate to Kennewick.

Section 8 of this order likewise authorizes such an adjustment. This section authorizes the extension of a rate in violation of the Fourth Section to a point in close proximity, provided that higher rates are not maintained between the original point

and the point to which the low rate has been extended (in this case to points between Pasco and Kennewick). Kennewick is in close proximity to Pasco, for the record shows that it is distant 2.7 miles therefrom, and it also appears that no higher rates were in effect at points between Kennewick and Pasco than those which applied from either of these points. The extension of the rates to Kennewick, therefore, was in strict conformity with Fourth Section Order No. 3700, but the objection is raised that this order is invalid. It appears, however, from the face of this order that an investigation preceded its promulgation. In the opening paragraph, the Commission states that experience has suggested certain modifications in its previous orders, thus necessarily assuming that the Commission had given this matter careful consideration. This order may, therefore, be considered in the light of partial relief extended to the carriers in connection with their previous applications. The relief, it has been held, need not necessarily be confined strictly to that sought by the applications.

> *United States v. Merchants etc. Assn.,* 242 U. S. 178.

Such an order was undoubtedly justified in view of the complexity of the various rate adjustments covered by the many applications on file, and also by the continuing changes in rate situations caused by the extension of new lines of railroad and com-

mercial conditions in general, which are never static but vary continuously from time to time. As we have pointed out, more than 5,000 applications were filed immediately after the amendment of 1910 and the Commission was thus confronted with an enormous task which has not yet been fully completed, as is shown by the annual report of 1922, from which it appears that over 1700 of these applications have not yet been acted upon. Necessarily the Commission in the performance of its administrative duties was obliged to make some temporary provision for readjustments due to changes in the transportation and commercial conditions and this, we submit, was the purpose of the Commission in promulgating Fourth Section Order No. 3700.

That order may be justified upon still another ground:

Prior to the amendment of February 28, 1920, Section 17 of the Interstate Commerce Act provided in part:

> "Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States."

A similar provision with slight changes of phraseology is contained in the amendment of 1920.

No one will dispute that a Fourth Section application is a "proceeding" pending before the Commission and it seems likewise indisputable that Fourth Section Order No. 3700, if it be assumed to be a general order, is one requisite "for the order and regulation" of Fourth Section applications pending before the Commission. This seems to dispose of counsel's objection that the order is invalid because it is general in form. This order is not open to the objection pointed out in the *Sacramento* case, supra, for here the Commission has accorded but temporary relief pending the completion of its investigation of these numerous applications filed in 1910, and it is not in any sense the granting of general relief without investigation.

(*c*) *The Applications Were Filed Within the Time Prescribed by the Amended Fourth Section.*

The act amending the Fourth Section was passed June 18th, 1910. It contained a proviso to the following effect:

> "*Provided further,* that no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this Section prior to the expiration of *six months* after the *passage* of this act, nor in any case where application shall have been filed before the Commission, *in accordance with the provisions of this section,* until a determination of

such application by the Commission." (Emphasis ours.)

It is contended by counsel for defendants in error that all applications for relief should have been filed on or before December 18, 1910, to be valid. If we accept this construction, it seems clear that the so-called omnibus applications are not susceptible to the objection that they were not filed within time, since the record shows that they were filed December 10, 1910 (Exhibits C and E) (77).

Objection was made to the application covering Pasco (Exhibit B) upon the ground that it was filed too late, it having been filed with the Commission February 11, 1911.

The statute by which this amendment was effected will be found in *36 U. S. Statutes at Large,* Chap. 309, page 539, *et seq.,* the amendment to the Fourth Section appearing on page 547, being Section 8 of the Act in question. Section 18 of this act appearing on page 557 reads:

> "That this act shall take effect and be in force from and after the expiration of sixty days after its passage, except as to Sections twelve and sixteen which sections shall take effect and be in force immediately."

The act was approved on June 18, 1910.

Sections 12 and 16 have no bearing whatsoever upon the Fourth Section. Therefore, under this

provision of the Statute the act took effect and was in force from and after August 17, 1910, sixty days after the date of approval. Under this construction the carriers were entitled to six months after that date, or until February 17, 1911, within which to file their applications for relief under the Fourth Section.

Such was the interpretation given the act by the Commission in its decision in *Colorado Coal Traffic Association v. C. & S. Ry. Co.,* 19 I. C. C. Rep. 478, where it was held that the six months period began to run August 17, 1910.

In its annual report for the year 1911, at page 20, the Commission said:

> "The amended act was approved June 18, 1910, and was, by its terms, to take effect sixty days from the date of its approval. The Fourth Section provided that no rates or fares in force at the time of the adoption of the amendment should be required to be changed by reason thereof for six months, nor until the application of the carriers for relief, when filed with the Commission, had been acted upon. It was the opinion of the Commission under this phraseology that carriers had until February 17, 1911, in which to file applications for relief from the Fourth Section, and that they were protected by these applications until each application had been investigated and acted upon by the Commission. Nothing could be done until February 17, 1911, since the Statute did not require changes in rates until that date."

At page 17 of its annual report for 1912, the Commission once more expresses the opinion that the period within which applications must be filed expired February 17, 1911. This opinion was reiterated in its report for 1913 at page 25; also in the annual report for 1916, at page 9; also in the annual report for 1917, at page 9.

This opinion, coming, as it does, from the body charged with the administration of this statute, is entitled to great weight. For many years the carriers have rested secure in the belief that the Commission's interpretation of the law was correct, and it seems to us to be highly inequitable at this late date to hold invalid many thousands of applications filed in the utmost good faith by the carriers in reliance upon the Commission's interpretation of the law. For this would be in effect the result of this court's decision, should it hold that the Pasco application was filed too late. Moreover, all of the reasons heretofore urged in support of the weight to be given to the Commission's practical interpretation of the law with respect to the form of the applications, apply with equal force here.

If it be said that there is an irreconcilable conflict between Section 8 of the act to which we have referred (36 Stat. L. Chap. 309) amending the Fourth Section of the Interstate Commerce Act, and Section 18, providing when the act shall take effect,

then Section 18, being the last in order of arrangement, should prevail.

36 Cyc., 1130;
Hall v. Equator Mining & Smelting Co., 11 Fed. Cas. No. 5931;
U. S. v. Jackson, 143 Fed. 783;
U. S. ex rel Harris v. Daniels, 279 Fed. 844.

On the other hand, if it be assumed that there is no such irreconcilable conflict between the two sections to which we have referred, we believe the same result will follow.

The amended Fourth Section relates to the filing of applications within "six months after the passage of this act," and Section 18 of the Act to which we have referred provides that the Act shall "take effect and be in force from and after the expiration of sixty days after its passage," excepting certain sections not material here which are to be in force immediately.

It is our contention that the term *"passage"* as used in the amended Fourth Section relates to the *time when the act takes effect* and not to the time when the act passed both houses of Congress and received the approval of the President. Such a construction has the sanction of authority. In an early case decided in Iowa, it appeared that the right of preemption of land was taken away by an act of January 24, 1857, which repealed all prior

acts allowing a preemption on swamp lands but contained a proviso saving the rights of all actual settlers on the lands at the time of the passage of the act. It was contended that as the petitioner began his improvement in June he was not within the proviso, but the court overruled this objection, saying with respect to the term "passage" that—

> "This, and similar expressions, in statutes, has regular reference to the time of their taking effect. No other construction would be consistent with that requirement of the constitution, which provides that the laws shall be published before they take effect. The defendant's construction would give the same effect, as if it provided for going into force at its passage."

Rogers v. Vass, 6 Iowa (Cole's Ed.) 405.

This case was followed in Idaho where it appeared that the Statute of Limitations had been changed by an act dated January 15, 1875, providing that—

> "When the cause of action has already accrued the party entitled and those claiming under him shall have, after the passage of this act, the whole period herein prescribed within which to commence an action."

The period then allowed by law for commencing an action upon a promissory note, which was the nature of the action in question, was five years. The first section of this act fixed the time when the act took effect as July 1st, 1875. The note was

dated October 31st, 1874, due upon demand, and suit was commenced February 28, 1880. It was contended that the term "passage" meant when the bill was signed by the governor, and that consequently, the suit was filed in time; but the court ruled that the term "passage," as used in the act, had reference to the date when it took effect and that, therefore, plaintiff's claim was barred.

After referring to the section fixing the time when the act became effective, the court said:

> "It will not be contended that one section of an act will take effect or be in force at any earlier date than other sections unless the act itself shall so state. There is no clause in this act providing that this section shall take effect sooner than any other section of the same act. This section, therefore, and no clause of it, can take effect until the first day of July, 1875. The words 'passage of the act,' while they have a technical meaning which is well understood, in this connection and as used in the section referred to, must be held to mean the time when the act takes effect. Any other construction of the words would give life and action to this section before it can have any such life."

Schneider v. Hussey, 2 Idaho 8; 1 Pac. 343.

It will be noted that there is no clause in the amended Fourth Section providing that it shall take effect sooner than any other section, and therefore, following the reasoning of the case last cited,

we must conclude that this section, together with all of the other sections of the same act, except as expressly provided otherwise, became effective August 17, 1910.

The term "passage of the act" was construed to mean its effective date in the following cases:

Harding v. People, 10 Colo. 387; 15 Pac. 727;
State v. Bemis, 45 Nebr. 724, 739; 64 N. W. 348;
Mills v. State Board of Osteopathy, 135 Mich. 525; 98 N. W. 19.

In the case last cited it appeared that the legislature had enacted a statute providing for the examination and registration of osteopaths, with a provision, saying all persons engaged in the practice of osteopathy at the time of the passage of the act, such persons being exempted from its provisions, but they were required, however, to hold a diploma from a regular college of osteopathy. When the act was approved (May 28, 1902) the relator did not have such a diploma but he obtained it on June 25th of that year and held it when the act took effect in September, 1903. The only question involved was whether the term "at the time of the passage of this act" referred to the date when the act was approved or when it took effect. The court held that this meant the time the act takes effect, saying:

> "while an act of the legislature is passed when it is approved by the Governor, the decisions are uniform, so far as we can ascertain, in

holding that the language 'at the time of the passage of this act' means when the act takes effect." (Citing cases.)

The Supreme Court of Kansas adopted this rule, holding that the term "passage of the act" must be construed as the time when it takes effect.

State Ex Rel. Jackson v. Bentley, 80 Kansas 227; 101 Pac. 1073.

This also has been the construction adopted by the Supreme Court of Texas; the syllabus, which clearly defines the point involved, states:

"A statute limiting the time for a prescribed act and giving effect to such limitation, as to existing conditions, from the date of the 'passage' of the law, will be understood as meaning by 'passage' the date when the law goes into effect, unless something appears to indicate a different intent" * * *.

And in the opinion, at page 142, the court says:

"The word 'passage' is used, in connection with legislation, in several senses. The adoption of a measure by either house is spoken of as its passage through that house. The final adoption of a bill by both the house and the senate is commonly spoken of as its passage. Again, after such adoption by the Legislature, the approval of a bill by the Governor is properly called its passage. Where acts take effect from their passage, the time of approval by the Governor, or of final adoption over his veto, or of their becoming laws without his signature

is, in law, called the time of their passage. But where the word is employed in an act which is finally passed at one time to take effect at a later time, it may, by reason of a somewhat common usage, be taken as referring to the latter date, unless such a construction is contrary to the intention appearing from the whole statute. The language of statutes which thus take effect at times subsequent to those of their adoption is usually taken as speaking only when they begin to operate as laws."

Scales v. Marshall, 96 Texas 140; 70 S. W. 945.

4. THE SO-CALLED BRANCH LINE POINTS ARE NOT INTERMEDIATE WITHIN THE MEANING OF THE FOURTH SECTION.

In a previous division of this brief, we have set forth in detail the names and location of these branch line points so it will be unnecessary to repeat them here. It is sufficient to say that they are not on the main line of the Northern Pacific.

The Fourth Section prohibits exacting a greater charge for a shorter than for a longer haul "over the *same* line or route in the *same* direction, the shorter being included within the longer distance." We contend that a point situated upon a branch line is not intermediate within the meaning of the Fourth Section. In fact, the Commission has so held.

Board of Trade of Cheraw v. Seaboard Air Line Ry., 26 I. C. C. Rep. 364, 389;

Berry Coal & Coke Co. v. C. R. I. & P. Ry. Co., 40 I. C. C. Rep. 175;
Mil. El. Ry. etc. Co. v. C. M. & St. P. Ry. Co., 15 I. C. C. Rep. 468.

The inconsistencies to which the construction contended for by defendants in error would lead are shown by the disagreement between counsel and his witness, Mr. Knox. The latter, while upon the witness stand, stated that he would go out on the branch line far enough so that his mileage on the branch line plus the mileage from the junction point to destination equalled the mileage from the point of origin to the point of destination (90). To show how this would operate, let us assume that it is 300 miles from Portland to Kennewick, and let it be further assumed that at a point midway between the two, that is to say, 150 miles from Portland, a branch extended southward for a distance of 300 miles. Under this theory rates upon the branch for a distance of 150 miles south of the junction point (this being 300 miles from Portland or the same distance as Kennewick) would be in violation of the Fourth Section, but as to all points further south the rates would not violate the Fourth Section. On the one hand, counsel for defendants in error takes the position that if the sum of the rates, say from Portland to the junction point, and the local rate on the branch, exceeds the rates to Kennewick, the extent of the violation under Fourth Section is measured by the difference

between these two rates. On the other hand, Mr. Knox urges mileage as a measure of the violation, while his counsel would use the combination of rates, which may be made in utter disregard of mileage. The only way to avoid these inconsistencies and practical difficulties of arriving at a proper measure of the rate is to hold that the Fourth Section has application only to main line points which are *directly* intermediate to the more distant point at which a lower rate exists, and such, we contend, is the proper interpretation to be given the statute, particularly in view of the interpretation put upon it by the Interstate Commerce Commission, which is entitled to the most weighty consideration.

CONCLUSION

It is therefore respectfully submitted,

First, That regardless of whether or not the Fourth Section departures were protected by applications filed with the Interstate Commerce Commission, the plaintiffs neither alleged nor proved a case because there was no allegation or proof of damage aside from the proof that plaintiffs, or their assignors, paid higher rates from the intermediate points than applied to the further distant point;

Second, That the court below was without jurisdiction of the subject matter of the action, the Interstate Commerce Commission having exclusive jurisdiction thereof;

Third, That any existing Fourth Section departures were protected by applications duly filed with the Interstate Commerce Commission; and

Fourth, That as to shipments moving from branch line points, the long and short haul provision of the Fourth Section of the Interstate Commerce Act is not applicable.

It is therefore respectfully submitted that the judgments of the lower court should be reversed and the actions dismissed.

Dated: San Francisco, California,
May 1st, 1924.

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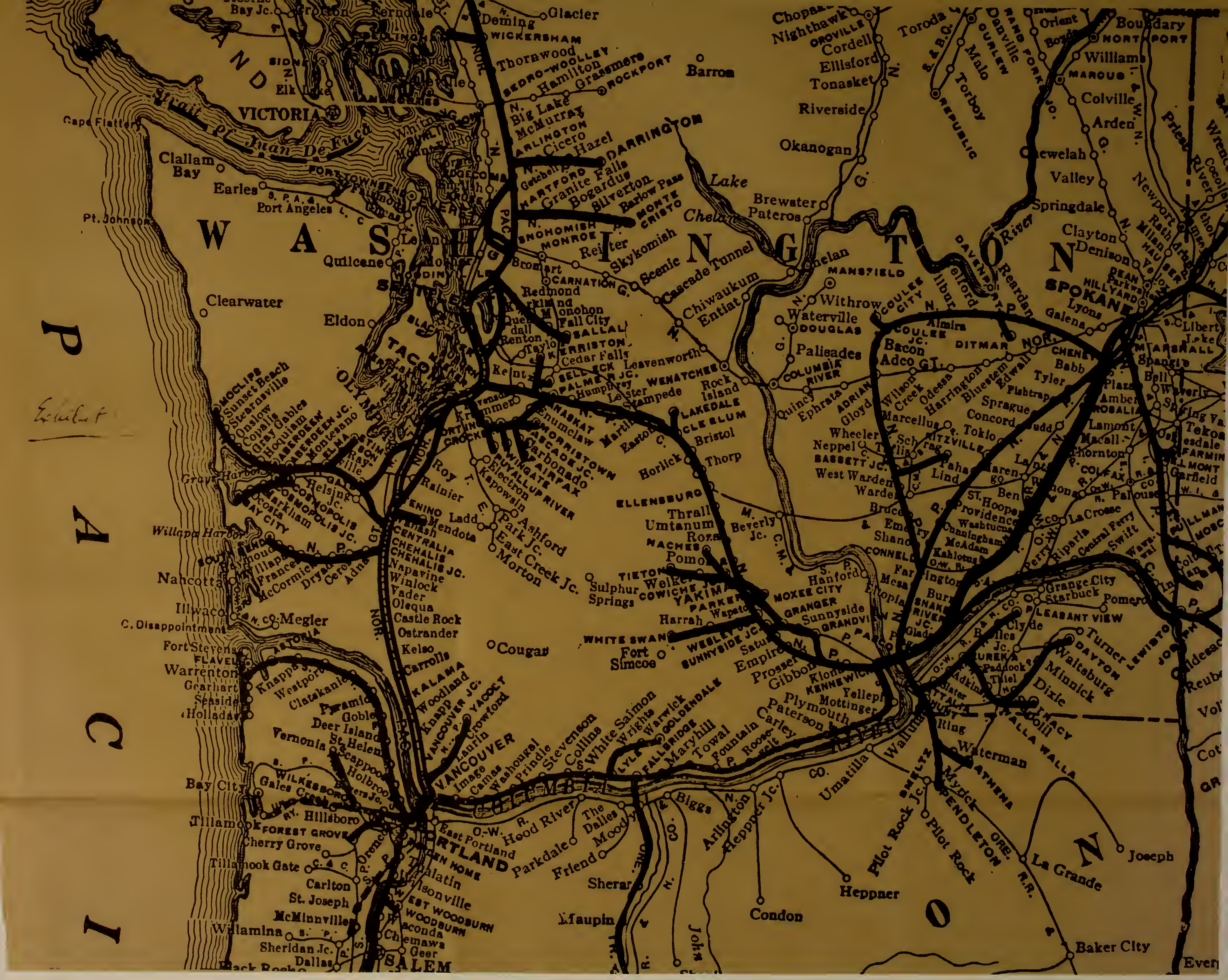

WASHINGTON
PACIFIC
OREGON
Strait of Juan De Fuca
VICTORIA
Cape Flattery
Clallam Bay
Earles
Port Angeles
Pt. Johnson
Quilcene
Clearwater
Eldon
TACOMA
OLYMPIA
Moclips
Sunset Beach
Hoquiam
Aberdeen
Montesano
Elma
Grays Harbor
Cosmopolis
Willapa Harbor
Nahcotta
Ilwaco
C. Disappointment
Megler
Fort Stevens
Flavel
Warrenton
Gearhart
Seaside
Holladay
Knappa
Westport
Clatskanie
Goble
Deer Island
St. Helens
Vernonia
Scappoose
Holbrook
Bay City
Tillamook
Forest Grove
Hillsboro
Cherry Grove
Tillamook Gate
Carlton
St. Joseph
McMinnville
Willamina
Sheridan Jc.
Dallas
SALEM
PORTLAND
East Portland
VANCOUVER
Camas
Washougal
Prindle
Stevenson
Collins
White Salmon
Lyle
Goldendale
Hood River
The Dalles
Moody
Parkdale
Friend
Sherar
Maupin
Biggs
Arlington
Heppner Jc.
Heppner
Condon
Umatilla
Wallula
Pilot Rock
Pendleton
Athena
Waterman
Walla Walla
La Grande
Joseph
Baker City
Kelso
Castle Rock
Ostrander
Kalama
Woodland
Olequa
Vader
Winlock
Napavine
Chehalis
Centralia
Mendota
Ladd
Ashford
Morton
East Creek Jc.
Cougar
Rainier
Roy
Kapowsin
Electron
Puyallup River
Wingate
Buckley
Enumclaw
Carbonado
Morristown
Seattle
Everett
Bellingham
Deming
Glacier
Wickersham
Sedro-Woolley
Hamilton
Rockport
Arlington
Darrington
Monte Cristo
Snohomish
Monroe
Skykomish
Scenic
Cascade Tunnel
Leavenworth
Wenatchee
Chelan
Lake Chelan
Brewster
Pateros
Okanogan
Riverside
Tonasket
Ellisford
Oroville
Nighthawk
Chopaka
Toroda
Republic
Curlew
Danville
Barron
Orient
Boundary
Northport
Williams
Marcus
Colville
Arden
Chewelah
Valley
Springdale
Clayton
Deer Park
Newport
Spokane
Hillyard
Cheney
Marshall
Spangle
Rosalia
Lamont
Colfax
Palouse
Pullman
Moscow
La Crosse
Riparia
Pomeroy
Lewiston
Starbuck
Grange City
Pleasant View
Turner
Dayton
Waltsburg
Dixie
Wallula
Kennewick
Pasco
Prosser
Sunnyside
Granger
Toppenish
Yakima
North Yakima
Parker
Wapato
Harrah
White Swan
Fort Simcoe
Naches
Tieton
Cowiche
Sulphur Springs
Ellensburg
Thorp
Cle Elum
Easton
Lester
Stampede
Hanford
Mesa
Connell
Lind
Ritzville
Odessa
Harrington
Davenport
Reardan
Coulee City
Almira
Wilbur
Mansfield
Waterville
Douglas
Palisades
Quincy
Ephrata
Adrian
Warden
Moxee City
Beverly Jc.

"Exhibit 2" (continued)

(Copy)

PACIFIC FREIGHT TARIFF BUREAU

San Francisco, Cal.

FORM A

Feb. 11, 1911.

PETITION No. 2

To the INTERSTATE COMMERCE COMMISSION,
Washington, D. C.

APPLICATION FOR RELIEF FROM PROVISIONS OF FOURTH SECTION OF AMENDED COMMERCE ACT FOR ACCOUNT OF TARIFF No. 1-A, I. C. C. No. 62, of F. W. GOMPH, Agent.

In the name and on behalf of each of the carriers parties to the Tariff above named, the undersigned, acting as Agent and Attorney, or under authority of concurrences on file with the Commission from each of the said carriers, respectfully petitions the Interstate Commerce Commission for authority to continue all rates in above named Tariff, between San Francisco, Oakland, San Jose, Stockton, Marysville, Los Angeles, Cal., and other points in California named in said Tariff, *and* Pasco, Wash., lower than the rates to points on the Northern Pacific Railway, intermediate to Pasco, Wash.

This application is based upon the desire of the Northern Pacific Railway to meet by direct haul over a longer line or route competitive conditions created at points directly competitive with Pasco, Wash., such as Wallula and Hunts Junction, Wash., by the Oregon-Washington Railroad and Navigation Co.

It is not practicable in this petition to state the rates in detail nor to specify the highest charge at intermediate points, nor the extent to which rates at the intermediate points exceed the rates at the more distant points named above.

F. W. GOMPH, Agent.

Subscribed and sworn to before me this 11th day of February, 1911,

H. T. SIME,

Notary Public in and for the City and County of San Francisco, Calif.

"Exhibit 3"

The Commission being of the opinion that the convenience of the carriers, the public, and the Commission will be better served by assembling in one general fourth section order, divided into numbered sections for convenient tariff reference, the general fourth section orders known as Fourth Section Order No. 100, General No. 2; Fourth Section Order No. 485, General No. 9; Fourth Section Order No. 839, General No. 11; and Fourth Section Order No. 2200, General No. 12, and experience having suggested certain modifications in the descriptions of conditions under which relief has been afforded by these orders, and certain additional situations as to which carriers may be relieved from the operation of said section, therefore,

"It is ordered, That Fourth Section Order No. 100, General No. 2; Fourth Section Order No. 485, General No. 9; Fourth Section Order No. 839, General No. 11; and Fourth Section Order No. 2200, General No. 12, be, and the same are hereby, vacated and set aside as of March 15, 1914.

"It is further ordered, That effective March 15, 1914, as to and confined in all cases to rates and fares which are included in and covered by applications for relief from the provisions of the fourth section of the act to regulate commerce that were filed with the Commission on or before February 17th, 1911, and until the applications including and covering such rates or fares have been passed on by the Commission, carriers may file with the Commission, in the manner and form prescribed by law and by the Commission's regulations, such changes in rates and fares as occur in the ordinary course of their business, continuing higher rates or fares at intermediate points, and through rates or fares higher than the combinations of intermediate rates or fares, provided that in so doing the discrimination against intermediate points is not thereby increased.

"It is further ordered, That as to and confined in all cases to rates which are included in and covered by applications as above described, carriers may file with the Commission in the manner and form prescribed by law and by the Commission's regulations, changes in rates under the following conditions, although the discrimination against intermediate points is thereby increased:

"Section 1. A through rate which is in excess of the aggregate of the intermediate rates lawfully published and filed with the Commission may be reduced to equal the sum of the intermediate rates.

"Sec. 2. Where a through rate has been, or is hereafter, reduced under the authority of section 1 of this order, carriers maintaining through rates via other routes between the same points may post the rate so made by the route initiating the reduction.

"Sec. 3. Where a reduction is made in the rate between two points under the authority of section 1 of this order, such reduction may extend to all points in the group which take the same rates as does the point from or to which the rate has been reduced.

"Sec. 4. Where through rates are in effect which exceed the lowest combination of rates lawfully published and filed with the Commission, carriers may correct said through rates by reducing the same to equal such lowest combination.

"Sec. 5. A larger line or route may reduce the rates in effect between the same points or groups of points to meet the rates of a shorter line or route when the present rates via either line do not conform to the fourth section of the act, under the following circumstances:

(a) Where the longer line is meeting a reduction in rates initiated by the shorter line.

(b) Where the longer line has not at any time heretofore met the rates of the shorter line.

"Sec. 6. A newly constructed line publishing rates from and to its junction points under the authority contained in paragraph (b) of Section 5, may establish from and to its local stations rates in harmony with those established from and to junction points.

"Sec. 7. Carriers whose rates between certain points do not conform to the fourth section of the act, which rates have been made lower than rates at intermediate points to meet the competition of water or rail-and-water carriers between the same points, may make such further reductions in rates as may be required to continue to effectively meet the competition of rail-and-water or all-water lines.

"Sec. 8. Where rates are in effect from or to a point that are lower than rates effective from or to intermediate points, carriers may extend the application of such rates to, or establish rates made with relation thereto at, points on the same line adjacent or in close proximity thereto, provided that no higher rates are maintained from and to points intermediate to the former point and the new point to which the application of the same or relative rates has been extended.

"Sec. 9. Where there is a rate on a commodity from or to one or more points in an established group of points from and to which rates are ordinarily the same, but the rate on the said commodity does not apply at all points in the said group, such rate may be made applicable to or from all of such other points.

"Sec. 10. Where there is a definite and fixed relation between the rates from and to adjacent or contiguous groups of points, and the rates to or from one of said groups are changed, corresponding changes may be made in the rates of the other groups to preserve such relation.

"Sec. 11. In cases where no through rates are in effect via the various routes or gateways between two points, and the combination of lawfully published and filed rates via one gateway makes less than the combination via the other gateway, a through rate may be established on the basis of the combination via the gateway over which the lowest combination can be made. and made applicable via all gateways.

"Sec. 12. In cases where through rates are in effect between two points, via one or more routes or gateways, which are higher than the combination of lawfully published and filed rates via one of these gateways, different carload minima being used on opposite sides of the gateway, a through rate may be established equal to the lowest combination of lawfully published and filed rates, using the higher of the carload minima but continuing the present higher through rate if based upon a lower carload minimum.

"The Commission does not hereby approve any rates that may be filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the act.

"And it is further ordered, That when the Commission passes upon any application for relief from the provisions of the fourth section with respect to the rates referred to herein, the order issued with relation thereto will automatically cancel the authority herein granted as to the rates covered and affected by such order."

"Exhibit 4"

SUPREME COURT OF THE UNITED STATES

Nos. 114, 122, 123, 209—October Term 1923

James C. Davis, as Agent, etc., 114 Petitioner, vs. The Portland Seed Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
The San Francisco and Portland Steamship Company, 122 Plaintiff in Error, vs. A. J. Parrington.	In Error to the United States Circuit Court of Appeals for the Ninth Circuit.
James C. Davis, Agent, United States Railroad Administration, 123 Plaintiff in Error, vs. A. J. Parrington.	
Great Northern Railway Company, 209 Petitioner, vs. McCaull-Dinsmore Company.	On Writ of Certiorari to the Supreme Court of Minnesota.

(April 7, 1924.)

Mr. Justice McReynolds delivered the opinion of the Court.

The courts below affirmed judgments for the plaintiffs in four separate actions brought to recover alleged overcharges on freight said to have been demanded by the respective carriers in violation of the long and short haul clause, Fourth Section, Interstate Commerce Act. c. 104, 24 Stat. 379, 380; c. 309, 36 Stat. 539, 547; c. 91, 41 Stat. 456, 480, which declares:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater com-

pensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance; Provided, That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section (The Transportation Act, 1920, added); but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed.'' * * *

All the cases involve the same fundamental question of law. The essential charge is that the carrier demanded and received greater compensation for transporting freight for a shorter distance than its published rate for transporting like property for a longer distance over the same route and in the same direction.

It will suffice to state that the salient facts and issues disclosed by record No. 114—Davis, Agent, v. The Portland Seed Company. They are typical.

Pecos is in Western Texas, 160 miles south of Roswell, N. M. A line of the Atchison, Topeka & Santa Fe Ry. System joins these points and extends northward to Denver, Colo., where it connects with the Union Pacific system which leads into the Northwest. January 4, 1919, the carrier received a car of alfalfa seed at Roswell for transportation to Walla Walla, Wash., by way of Denver. Three weeks later respondent Port-

land Seed Company received this car at destination and paid freight charges reckoned at $2.44 per hundred pounds—the scheduled rate from Roswell. During all of January, 1919, the initial carrier's published schedule specified $1.515 per hundred pounds as the rate for transporting alfalfa seed from Pecos to Walla Walla through Roswell and Denver; and no application had been made to the Interstate Commerce Commission for permission to charge less for the longer than for the shorter haul. The Seed Company demanded judgment for the excess above the Pecos rate, as an overcharge illegally exacted and recoverable as money had and received.

The insistence is that under the long and short haul clause the lower published rate from Pecos became the maximum which the carrier could charge for the shipment from Roswell, notwithstanding the higher published rate therefor; that the sum charged above the Pecos rate amounted to an illegal exaction, recoverable without other proof of actual damage and without regard to the intrinsic reasonableness of either rate.

Relying on Pennsylvania R. R. Co. v. International Coal Co., 230 U. S. 184, the Interstate Commerce Commission has definitely rejected respondent's theory by many opinions, and holds that while a charge prohibited by the long and short haul clause, section 4, may subject the carrier to prosecution by the Government it does not afford adequate basis for reparation where there is no other proof of pecuniary damage. Nix & Co. v. Southern Ry. Co., (1914) 31 I. C. C. 145; S. J. Greenbaum Co. v. Southern Ry., 38 I. C. C. 715; Chattanooga Implement & Mfg. Co. v. Louisivlle & Nashville R. R. Co., 40 I. C. C. 146; LeCrosse Shippers' Asso. v. C. I. & L. Ry. Co., 43 I. C. C. 520; Oregon Fruit Co. v. Southern Pacific Co., 50 I. C. C. 719; Item Biscuit Co. v. C. B. & Q. R. R. Co., 53 I. C. C. 729; Illinois Brick Co. v. Director General (1920), 57 I. C. C. 320, 323.

Counsel insist that under section 4 it was unlawful to charge compensation above the published Pecos rate for the transportation from Roswell to Walla Walla. Therefore, the published Roswell rate being unlawful, non-existent indeed, the Pecos rate became the only one in force. United States v. Louisville & Nashville R. R. Co., 235 U. S. 314, 323, is relied upon; and it is said that the opinion there interprets the long and short haul clause as "absolutely prohibiting the existence" of higher rates for shorter hauls unless approved by the Commission. Read with the real issue in mind, the opinion gives no support to respondent's argument. The Interstate Commerce Commission held that certain reshipping privileges granted to Nashville but refused to Atlanta amounted to unreasonable preference under section 3 and ordered the carrier to discontinue them. The Commerce Court restrained the enforcement of this order. This Court declared that the challenged privileges were prohibited by the long and short haul clause; that section 4 controlled the right to grant them; that they had not been authorized by the Commission; and therefore it would be unlawful to continue them. Accordingly, the order to desist was approved and the decree of the Commerce Court reversed. No disagreement with Pennsylvania R. R. Co. v. International Coal Co., was suggested. The Court said:

(322-3) "The express or implied statutory recognition of the authority on the part of carriers to primarily determine for themselves the existence of substantially similar circumstances and conditions as a basis of charging a higher rate for a shorter than for a longer distance within the purview of section 4 of the Act to Regulate Commerce and the right to make a rate accordingly to continue in force until on complaint it was corrected in the manner pointed out by statute ceased to exist after the adoption of the amendment to section 4 by the Act of June 18, 1910, c. 309, 36 Stat. 539, 547. This results from the fact that by the amendment in question the original power to determine the existence of the conditions justifying

the greater charge for a shorter than was exacted for a longer distance, was taken from the carriers and primarily vested in the Interstate Commerce Commission, and for the purpose of making the prohibition efficacious it was enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted. Intermountain Rate Cases, 234 U. S. 476. If then it be that the rebilling privilege which is here in question, disregarding immaterial considerations of form and looking at the substance of things, was, when originally established, an exertion of the authority conferred or recognized by section 4 of the Act, as there is no pretense that permission for its continuance had been applied for as required by the amendment and the statutory period for which it could be lawfully continued without such permission had expired, it follows that its continued operation was manifestly unlawful and error was committed in permitting its continuance under the shelter of the injunction awarded by the court below."

The opinion does not discuss the carrier's liability to shippers who had paid higher rates for the shorter hauls. No doubt similar relief would have been granted by the Commission if the situation here revealed had been brought before it.

Respondent has not asked an injunction against illegal rates. It seeks to secure something for itself without proof of pecuniary loss consequent upon the unlawful act. A similar effort failed in Pennsylvania R. R. Co. v. International Coal Co., supra. The International Company shipped 40,000 tons of coal from the Clearfield district, paying full schedule rates. The carrier had allowed other shippers from and to the same places at the same time rebates ranging from five to thirty-five cents per ton. Without alleging or proving pecuniary injury resulting to itself from this unlawful action, the Company sought to recover like concessions upon all its shipments. Through Mr. Justice Lamar, this Court said:

(196-7) "The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged. When collected, it was unlawful, under any pretense or for any cause, however equitable or liberal, to pay a part back to one shipper or to every shipper. The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper * * * The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

(200) "Though the Act has been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in Parsons v. Chicago & N. W. Railway, 167 U. S. 447, 460, construing this section (8), 'before any party can recover under the Act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.' Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what though called damages would really be a penalty, in addition to the penalty payable to the Government. On the contrary, and in answer to the argument that damages might be a cover for rebates, the Act of June 18, 1910 (36 Stat. 539, c. 309), provided that where a carrier misquotes a rate it should pay a penalty of $250, not to the shipper, but to the Government, recoverable by a civil action brought by the United States. 35 Stat. 166. Congressional Record (1910), 7569. The danger that payment of damages for violations of the law might be used as a means of

paying rebates under the name of damages is also pointed out by the Commission in 12 I. C. C. 418-421, 423; 14 I. C. C. 82."

(200) "It is said, however, that it is impossible to prove the damages occasioned one shipper by the payment of rebates to another; and that if the plaintiff is not entitled to recover as damages the same drawback that was paid to its competitor, the statute not only gives no remedy but deprives the plaintiff of a right it had at common law to recover this difference between the lawful and the unlawful rate."

(200-1) "We are cited to no authority which shows that there was any such ancient measure of damages, and no case has been found in which damages were awarded for such discrimination. Indeed, it is exceedingly doubtful whether there was at common law any right of action for any sort of damages in a case like this, while this statute does give a clear, definite and positive right to recover for unjust discrimination."

(201-2) "Union Pacific R. R. v. Goodridge, 149 U. S. 680, 709, involved the construction of the Colorado statute, which did not, as does the Commerce Act, compel the carrier to adhere to published rates, but required the railroad to make the same concessions and drawbacks to all persons alike, and for a failure to do so made the carrier liable for three times the actual damage sustained or overcharges paid by the party aggrieved. This distinction is also to be noted in the English cases cited. The Act of Parliament did not require the carrier to maintain its published tariff but made the lowest rate the lawful rate. Anything in excess of such lowest rate was extortion and might be recovered in an action at law as for an overcharge. Denaby v. Manchester Ry., L. R. 11 App. Cases, 97, 116. But the English courts make a clear distinction between overcharge and damages, and the same is true under the Commerce Act. For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages but as overcharge, and while one count of the complaint asserted a claim of this nature, the proof did

not justify a verdict thereon, for the plaintiff admitted that it had only paid the lawful rates named in the tariff. Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion."

(202-203) "Having paid only the lawful rate plaintiff was not overcharged, though the favored shipper was illegally undercharged. For that violation of law, the carrier was subject to the payment of a fine to the Government and, in addition, was liable for all damages it thereby occasioned the plaintiff or any other shipper. But, under sec. 8, it was only liable for damages. Making an illegal undercharge to one shipper did not license the carrier to make a similar undercharge to other shippers, and if having paid a rebate of 25 cents a ton to one customer the carrier in order to escape this suit had made a similar undercharge or rebate to the plaintiff, it would have been criminally liable, even though it may have been done in order to equalize the two companies. For, under the statute, it was not liable to the plaintiff for the amount of the rebate paid on contract coal, but only for the damages such illegal payment caused the plaintiff. The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered. Whatever they were they could be recovered, because sec. 8 expressly declares that wherever the carrier did an act prohibited or failed to do any act required, it should be '*liable to the person injured thereby for the full amount of damages sustained in consequence of such violation * * * together with reasonable attorney's fee*'."

(206) "To adopt such a rule and arbitrarily measure damages by rebates would create a legalized, but endless, chain of departures from the tariff; would extend the effect of the original crime, would destroy the equality and certainty of rates, and, contrary to the statute, would make the carrier liable

for damages beyond those inflicted and to persons not injured. The limitation of liability to the persons damaged and to an amount equal to the injury suffered is not out of consideration for the carrier who has violated the statute. On the contrary, the Act imposes heavy penalties, independent of the amount of rebate paid, and as each shipment constitutes a separate offense, the law in its measure of fine and punishment is a terror to evildoers. But for the public wrong and for interference with the equal current of commerce these penalties or fines were made payable to the Government. If by the same act a private injury was inflicted a private right of action was given. But the public wrong did not necessarily cause private damage, and when it did, the pecuniary loss varied with the character of the property, the circumstances of the shipment and the state of the market, so that instead of giving the shipper the right to recover a penalty fixed in amount or measure, the statute made the guilty carrier liable for the full amount of damages sustained—whatever they might be and whether greater or less than the rate of rebate paid."

Southern Pacific Co. v. Darnell-Taenzer Co., 245 U. S. 531, presents no conflict with Pennsylvania R. R. v. International Coal Co. There the shipper paid a published rate which the Commission afterwards found to be unreasonable. This Court held he could recover, as the proximate damage of the unlawful demand, the excess above the rate which the Commission had declared to be reasonable. The opinion went no further. Certainly it did not suggest that the unreasonable rate was nonexistent for any purpose because forbidden by law.

Section 6 of the Commerce Act directs—

"(1) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad,

by pipe line, or by water when a through route and joint rate have been established. * * * (3) No change shall be made in the rates, fares and charges or joint rates, fares and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission. * * * Provided, that the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified. * * * (7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined by this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportaion of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privilege or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

"Sec. 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier, shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

"Sec. 10 (1) That any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation, who, alone or with any other corporation, company, person or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter or thing in this Act required to be done; or shall cause or willingly suffer or permit any act, matter or thing so directed or required by this Act to be done or not to be done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense; Provided, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares or charges for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

What liability did the carrier incur by publishing a rate from Pecos lower than the scheduled one from Roswell without the Commission's permission, and thereafter imposing and collecting the higher rate upon the shipment to Walla Walla?

Construing the words of section 4 literally, it is argued that unless some property moved over the longer distance at the lower rate before greater compensation was charged for transporting like property over a shorter one, there was no violation of law. We cannot accept this view. It does not accord proper

weight to imperative requirements concerning publication of rates and subsequent observance of them. The Commission holds, for example, that although the schedule contains a plain clerical error, nevertheless, no other charge may be demanded and the shipper may recover any excess. Lamb-Fish Lumber Co. v. Y. & M. V. R. R. Co., 42 I. C. C. 470.

The record shows, we think, that the carrier violated the statute by publishing the lower rate for the longer haul without permission, and, prima facie at least, incurred the penalties of section 10. Also, it became "liable to the person or persons injured thereby for the full amount of damages sustained in consequence of * * * such violation," together with reasonable counsel fees, as provided by section 8. But mere publication of the forbidden lower rate did not wholly efface the higher intermediate one from the schedule and substitute for all purposes the lower one, as a supplement might have done, without regard to the reasonableness or unreasonableness of either.

With special knowledge of rate schedules and relying on Pennsylvania R. R. Co. v. International Coal Company, the Interstate Commerce Commission for ten years has required proof of financial loss as a prerequisite to reparation for infractions of the Fourth Section. The rule is firmly established. Congress has not shown disapproval. The Transportation Act, 1920, with evident purpose to conserve the carriers' revenues, added the following to the proviso which gives power to exexempt from the long and short haul clause: "But in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed." The rule adopted by the Commission follows the logic of the opinion relied upon and can be readily applied. The contrary view would not harmonize with other provisions of the Act; and, put into practice, would produce unfortunate consequences.

The statute requires rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified. It commanded adherence to the published rate from Roswell; section 6 forbade any other charge. Observance of the lower rate from Pecos, put in without authorization, might have been forbidden, as pointed out in United States v. Louisville & Nashville R. R. Co., supra; but it would be going too far to hold, as respondent insists, that the unauthorized publication established the lower rate as the maximum permissible charge from the intermediate point—the only rate therefrom which could be demanded.

If a lower rate published without authority becomes the maximum which may be charged from any intermediate point, mistakes in schedules (and they are inevitable) may become disastrous. Suppose the rate from an obscure point in Maine to San Francisco via Boston, New York and Chicago should be printed at $15.00, instead of $150, and the error remain undiscovered for many months, could all who had paid more than $15.00 for passage along that route recover the excess without proof of pecuniary loss?

After the challenged judgments were entered, Kansas City Southern Ry. v. Wolf, 261 U. S. 133, was decided. We adhere to the ruling there announced, and in view of it defenses in these causes based upon prescribed limitations must be determined.

The judgments below are reversed. The causes will be remanded with appropriate instructions for further proceedings.

Mr. Justice Brandeis dissents.

A True Copy.

Test:

Clerk, Supreme Court, U. S.

No. 4202

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

HERBERT H. McGOVERN,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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JOHN L. SLATTERY, Esq., U. S. Attorney,

RONALD HIGGINS, Esq., Asst. U. S. Attorney,

W. H. MEIGS, Esq., Asst. U. S. Attorney,

Of Helena, Montana,

LAWRENCE A. LAWLOR, Attorney for United States Veterans Bureau,

Of Washington, D. C.,

Attorneys for Defendant and Plaintiff in Error. [1*]

In the District Court of the United States, in and for the District of Montana.

No. 948.

HERBERT McGOVERN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

*Page-number appearing at foot of page of original certified Transcript of Record.

BE IT REMEMBERED that on the 7th day of September, 1921, a summons was duly issued herein, being in the words and figures following, to wit: [2]

UNITED STATES OF AMERICA.

District Court of the United States, District of Montana.

HERBERT McGOVERN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Action brought in the said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City of Gt. Falls, County of Cascade.

SUMMONS.

The President of the United States of America, GREETING: To the Above-named Defendant, the United States of America.

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case your failure to appear or answer, judgment will be taken

against you by default, for the relief demanded in the complaint.

WITNESS, the Honorable GEO. M. BOURQUIN, Judge of the United States District Court, District of Montana, this 7th day of Sept. in the year of our Lord one thousand nine hundred and 21, and of our Independence the 146.

[Seal] C. R. GARLOW,
Clerk.

By ————————,
Deputy Clerk.

United States Marshal's Office,
District of Montana.

I hereby certify, that I received the within summons on the 7th day of Sep., 1921, and personally served the same on the 7th day of Sep., 1921, on John L. Slattery, U. S. District Attorney, by delivery to, and leaving with him as representing said defendant named therein personally, at Great Falls, county of Cascade, in said District, a certified copy thereof, together with a copy of the complaint, certified to by C. R. Garlow, Clerk, attached thereto.

Dated this 7th day of Sep., 1921.

JOSEPH L. ASBRIDGE,
U. S. Marshal.

By ————————,
Deputy.

[Endorsed]: No. 948. U. S. District Court, District of Montana. Herbert McGovern vs. United States. Summons. L. J. Molumby, Plaintiff's Attorney. Montana. Filed Sept. 8, 1921.

C. R. Garlow, Clerk. By ————, Deputy Clerk.
[3]

Thereafter, on August 4, 1922, an amended complaint was filed herein, being in the words and figures following, to wit:

In the District Court of the United States for the District of Montana.

HERBERT H. McGOVERN,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

AMENDED COMPLAINT.

COMES NOW the plaintiff in the above-entitled action and for his cause of action against the defendant alleges:

I.

That plaintiff has been for a period of more than three (3) years last past and still now is a resident of Cascade County, District of Montana.

II.

That on or about the nineteenth day of June, 1917, he enlisted in the naval forces of the United States of America and that down to and including the 17th day of October, 1918, he served the Government of the United States of America as a first-class machinist in its navy and was during all of said time employed in active service during the war with Germany and its allies.

III.

That on or about the 10th day of July, 1917, said Herbert H. McGovern made application for insurance under the provisions of Article IV of the War Risk Insurance Act of Congress and the rules and regulations of the War Risk Insurance [4] Bureau established by said act in the sum of Ten Thousand Dollars ($10,000.00) and that thereafter he was duly issued a certificate by said War Risk Insurance Bureau, of his compliance with said War Risk Insurance Act so as to entitle him to the benefits of the insurance provisions of said act and of the other acts of Congress relating thereto and the rules and regulations promulgated by the War Risk Insurance Bureau or the Director thereof. And that thereafter and during his term of service under the War Department as aforesaid, there was deducted from his pay for said services, by the United States Government through its proper officers, the monthly premium upon said insurance provided for by said act and by the rules and regulations promulgated by the Bureau of War Risk Insurance and by the Director thereof.

IV.

That during the period of his service in said war with Germany and its allies as above set forth, and while acting in line of duty in such service and as a direct and proximate result of such service, the said Herbert H. McGovern suffered an impairment of mind and in addition thereto a disability which at various times has been diagnosed by different Government officials and Public Health Service of-

ficers as tuberculosis and neuro-psychosis, which said disability has continually rendered and still now does render the said plaintiff unable to follow any substantial and gainful occupation and which said disability is of such a nature that it is reasonably certain to continue throughout the lifetime of said plaintiff and said plaintiff has been ever since his discharge from the United States navy, to wit, the 17th day of October, 1918, and still now is totally and permanently disabled by reason of and as a direct result of said disability contracted in the service of the United States during the late war with Germany and its allies. [5]

V.

But after contracting said tuberculosis and neuro-psychosis, said plaintiff was confined by the Government of the United States of America, acting through its proper officers, in Government hospitals, in the neuro-psychosis ward in a sanitarium at Minneapolis, Minnesota, and in the Asbury Hospital, Minneapolis, Minnesota, and has been and still now is wholly unable to do any work of any nature whatsoever. That ever since his discharge from the United States navy the plaintiff has been and still now is subject to fainting spells or fits, a nervous condition characteristic of neuro-psychosis and shell shock cases, which have been so prevalent and which are and have been so acute that the slightest exertion or excitement brings on such a fit or fainting spell.

VI.

That plaintiff made application to the United

States Government through the Veterans' Bureau and the Director thereof and through the Bureau of War Risk Insurance and the Director thereof for the benefits of said insurance and for the monthly payments due under the said provisions of said War Risk Insurance Act for total permanent disability. That said Veterans' Bureau and the said War Risk Insurance Bureau and the directors thereof have refused to pay the plaintiff the amount provided for by the War Risk Insurance Act and have disputed the claim of the plaintiff to the benefits of the War Risk Insurance Act and have refused to grant him said benefits and have disagreed with the plaintiff concerning his rights to the insurance benefits of said War Risk Insurance Act.

VII.

That under the provisions of the War Risk Insurance Act and other acts of Congress relating thereto, plaintiff is [6] entitled to the payment of Fifty-seven and 50/100 Dollars ($57.50) per month for each and every month transpiring since the date of his discharge from the United States Navy, and that there is now due and owing from the United States Government to the plaintiff the sum of Two Thousand Five Hundred Thirty and 00/100 Dollars ($2,530.00).

WHEREFORE, plaintiff prays judgment against the defendant in the sum of Two Thousand Five Hundred Thirty and 00/100 Dollars ($2,-

530.00) and for such other and further relief as to this Honorable Court may seem just.

LOY J. MOLUMBY.
Attorney for Plaintiff.

State of Montana,
County of Cascade,—ss.

Loy J. Molumby, being first duly sworn, deposes and says: That he is attorney for the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the matters and things therein stated are true of his own knowledge except as to those matters therein stated on information and belief and as to such matters he believes them to be true; that the reason this verification is made by the affiant is that the plaintiff is now not a resident of Cascade County and is not now within the county wherein affiant resides and this affidavit is made.

LOY J. MOLUMBY.

Subscribed and sworn to before me this 2d day of Aug., 1922.

[Seal] GEORGE A. JUDSON,
Notary Public in and for the State of Montana, Residing at Great Falls, Montana.

My commission expires Apr. 1, 1923. [7]

Service of the within amended complaint was hereby admitted this 3d day of August, 1922.

W. H. MEIGS,
Assistant United States Attorney, District of Montana.

Filed Aug. 4, 1922. C. R. Garlow, Clerk. [8]

Thereafter, and on November 7, 1922, answer to amended complaint was filed herein, being in the words and figures following, to wit:

In the District Court of the United States, District of Montana, Great Falls Division.

HERBERT McGOVERN,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

ANSWER TO AMENDED COMPLAINT.

Comes now the defendant, the United States of America, and for answer to the amended complaint of plaintiff on file herein, admits, denies, and alleges as follows:

I.

Alleges that defendant has no knowledge or information, sufficient to form a belief, as to the residence of plaintiff and therefore denies that he is a resident of Cascade County, District of Montana.

II.

Admits the allegations of paragraph II of said complaint.

III.

Answering paragraph III of said complaint, defendant admits that plaintiff made application for war risk insurance, in the sum of Ten Thousand Dollars ($10,000.00), but alleges said application was made on the 5th day of March, 1918, and not

on the 10th day of July, 1917, as set forth in paragraph II of said complaint, and admits that a certificate was thereafter issued by the War Risk Insurance Bureau to said plaintiff, in said sum, but alleges that the insurance granted under said application and said certificate lapsed on the 31st day of [9] August, 1919, for failure by plaintiff to pay premiums thereon, as required by law, and that said insurance was, at the institution of this action, and now is, and ever since the 31st day of August, 1919, has been, in a state of lapse, void, and of no effect, by reason of the failure of plaintiff to pay the premiums thereon, as required by law.

IV.

Defendant denies the allegations and matters contained in paragraphs IV and V of said complaint.

V.

Defendant admits the allegations contained in paragraph VI of said complaint.

VI.

Defendant denies the allegations and matters contained in paragraph VII of said complaint.

VII.

Defendant denies each and every allegation, matter, and thing set forth in said complaint, not herein specifically answered, admitted, or denied.

For a further and separate defense to plaintiff's amended complaint, defendant alleges:

I.

That on the 5th day of March, 1918, plaintiff made application for insurance under the provi-

sions of Article IV of the War Risk Insurance Act of Congress, and the rules and regulations of the War Risk Insurance Bureau, established by said act, in the sum of Ten Thousand Dollars ($10,000.00), and thereafter, a certificate of insurance, in said sum, was issued to plaintiff, by said War Risk Insurance Bureau. That [10] said insurance continued in full force and effect until the 31st day of December, 1918, when said insurance lapsed for failure on the part of plaintiff to pay the premiums thereon, as provided by law, but that said insurance was reinstated on the 1st day of March, 1919, upon application of plaintiff for reinstatement and payment, by him thereon, of back premiums and advance premiums up to, and including the month of July, 1919. That subsequently plaintiff failed to pay premium on said insurance, and under the rules and regulations of the war risk insurance, and this defendant, in such cases made and provided, said insurance lapsed on the 31st day of August, 1919, and became null and void, and of no effect, and defendant was absolved of all liability thereunder, and that said insurance, for nonpayment of premiums thereon, is now and was at the institution of this action, and ever since the 31st day of August, 1919, has been, in a state of lapse, void, and of no force and effect.

II.

That said plaintiff has not become, and was not permanently and totally disabled, at any time while his said insurance was in force and effect.

WHEREFORE, defendant prays for judgment in its favor, and for the dismissal of this action, and for costs of suit.

JOHN L. SLATTERY,
United States Attorney for the District of Montana.

RONALD HIGGINS,
Assistant United States Attorney, District of Montana.

United States of America,
District of Montana,—ss.

Ronald Higgins, being first duly sworn, on oath, deposes and says: [11]

That he is a duly appointed, qualified and acting Assistant United States Attorney for the District of Montana, and attorney for defendant herein, and as such makes this verification to the foregoing answer; that he has read the same and knows the contents thereof, and that the matters and things herein stated are true to the best of his knowledge, information and belief.

RONALD HIGGINS.

Subscribed and sworn to before me this 7th day of November, 1922.

[Seal] H. H. WALKER,
Deputy Clerk, United States District Court, District of Montana.

Filed Nov. 7, 1922. C. R. Garlow, Clerk. By H. H. Walker, Deputy.

Thereafter, and on July 9, 1923, motion for judgment in favor of defendant, at conclusion of case was filed herein, being in the words and figures following, to wit: [12]

In the District Court of the United States, District of Montana, Great Falls Division.

HERBERT McGOVERN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

MOTION FOR JUDGMENT IN FAVOR OF DEFENDANT AT CONCLUSION OF CASE.

Now comes the defendant, the United States of America, at the conclusion of the above-entitled case, and moves the Court for judgment in favor of said defendant, on the following grounds:

I.

That the director of the United States Veterans Bureau has decided that plaintiff was not permanently and totally disabled on August 31, 1919, the date plaintiff's insurance lapsed, and such finding is not shown to be unreasonable by any evidence submitted at the trial of this action.

II.

That the evidence submitted in behalf of the defendant, the United States of America, at the trial, shows that there was sufficient evidence before the director of the United States Veterans

Bureau upon which the said director might reasonably find that the plaintiff was not permanently and totally disabled on or before August 31, 1919, the date upon which plaintiff's insurance lapsed for nonpayment of premiums.

III.

That all evidence submitted by the plaintiff in the trial of this action is incompetent, immaterial and irrelevant [13] for the reason that it was not shown to have previously submitted to the United States Veterans Bureau, and hence could not constitute such a disagreement as would entitle the plaintiff to bring suit under the provisions of Sec. 13 of the War Risk Insurance Act (40 Stat. 555), which is the only provision authorizing suit against the defendant, the United States of America, relative to war risk insurance matters.

IV.

That the evidence submitted by the plaintiff does not show that the plaintiff was, on or before August 31, 1919, totally disabled from following any substantially gainful occupation, in such a manner as might reasonably be expected to continuously and totally disable the plaintiff during the remainder of his lifetime.

V.

That the evidence submitted at the trial of this action does not show that the plaintiff ever was, or now is, permanently and totally disabled, within the meaning and terms of the War Risk Insurance Act, and amendments thereto, and the rules and

regulations made thereunder and by authority thereof.

VI.

That the plaintiff has failed to prove by any evidence in this case that he is entitled to judgment against the defendant upon any ground whatsoever.

RONALD HIGGINS,
Assistant United States Attorney, District of Montana.

Filed July 9, 1923. C. R. Garlow, Clerk. [14]

Thereafter, and on November 26, 1923, the decision of the Court was filed herein, said decision being set out in the bill of exceptions. [15]

Thereafter, and on December 17, 1923, judgment was duly entered herein, being in the words and figures following, to wit:

In the District Court of the United States, in and for the District of Montana, Great Falls Division.

#948.

HERBERT H. McGOVERN,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT.

This cause came on regularly to be tried on the 27th day of June, 1923, Loy J. Molumby, Charles Davidson, W. H. Radermacher, and J. M. Gault appearing as counsel for the plaintiff and Ronald Higgins, Assistant U. S. District Attorney for the District of Montana, and L. A. Lawlor, appearing as counsel for the defendant;

Said cause was tried before the Court sitting without a jury whereupon witnesses were sworn and examined on the part of the plaintiff and witnesses were sworn and examined on the part of the defendant and the evidence being closed, the cause was submitted to the Court for consideration and decision and after due deliberation thereon the Court delivered its finding and decision in writing which is filed and orders that due judgment be entered in accordance therewith;

WHEREFORE, by reason of the law and the findings aforesaid it is ORDERED AND ADJUDGED that Herbert H. McGovern, do have and recover of the United States of America, the defendant, the sum of Twenty-five Hundred and Thirty ($2530.00); that the plaintiff herein shall pay his attorney a reasonable attorney's fee determined and allowed by the Court in amount 5% of plaintiff's recovery herein. [16]

Judgment rendered the 17th day of December, 1923.

[Seal] C. R. GARLOW,
Clerk.
By Conrad G. Kegel,
Deputy.

Thereafter, and on January 22, 1924, petition for writ of error was filed herein, being in the words and figures following, to wit: [17]

In the District Court of the United States, District of Montana, Great Falls Division.

HERBERT H. McGOVERN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

PETITION FOR WRIT OF ERROR.

And now comes the United States of America, defendant herein, and says:

That on the 17th day of December, 1923, the District Court entered a judgment herein in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereto, in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, defendant prays that a writ of error may issue in this behalf, out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and

papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

JOHN L. SLATTERY,
United States Attorney.
N. H. MEIGS,
RONALD HIGGINS,
Assistant United States Attorneys,
Attorneys for Defendant.

Filed Jan. 22, 1924. C. R. Garlow, Clerk. [18]

Thereafter, and on January 22, 1924, assignment of errors was filed herein, being in the words and figures following, to wit:

In the District Court of the United States, District of Montana, Great Falls Division.

HERBERT H. McGOVERN,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

ASSIGNMENT OF ERRORS.

The defendant in this action, in connection with its petition for writ of errors, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, makes the following assignment of errors, which it avers exist:

1. The Court erred in finding that plaintiff was permanently and totally disabled within the mean-

ing of the War Risk Insurance Act and acts supplemental thereto.

2. The Court erred in finding that plaintiff was permanently and totally disabled within the meaning and intent of the War Risk Insurance Act and Acts supplemental thereto before August 31, 1919.

3. The Court erred in finding that the plaintiff's contract of insurance, under the War Risk Insurance Act and acts supplemental thereto, did not lapse on August 31, 1919. [19]

4. The Court erred in failing to find that the plaintiff's contract of insurance under the War Risk Insurance Act and acts supplemental thereto, lapsed on August 31, 1919.

5. The Court erred in finding that plaintiff's contract of insurance, under War Risk Insurance Act and acts supplemental thereto, matured on August 31, 1919.

6. The Court erred in admitting in evidence, over objection of defendant, all exhibits of plaintiff concerning matters arising after August 31, 1919.

7. The Court erred in admitting in testimony on behalf of plaintiff, and over the objection of the defendant, concerning matters arising after August 31, 1919.

8. The Court erred in not restricting testimony on behalf of plaintiff to matters and events on and before August 31, 1919, and such that had been submitted by or on behalf of the plaintiff to the Bureau of War Risk Insurance or to the United States Veterans' Bureau.

9. The Court erred in admitting in evidence

the exhibits of plaintiff for a purpose other than to show a basis of disagreement between plaintiff and defendant.

10. The Court erred in admitting, on behalf of plaintiff and over the objection of defendant, testimony on matters never submitted to the War Risk Insurance Bureau or the United States Veterans' Bureau, and which were not and could not be the basis of disagreement.

11. The Court erred in admitting the testimony of F. L. Carey, William P. Callahan, Loy J. Molumby, Lola Beller, Dr. Dora Walker, Dr. J. C. Michael, Dr. Thomas F. Walker, Dr. C. E. K. Vidal, Herbert H. McGovern, Sr., W. S. Bentley and Herbert H. McGovern, Jr., on behalf of plaintiff and over the objection of defendant.

12. The Court erred in not finding that under the terms of the War Risk Insurance Act and acts supplemental thereto, the determination of the Bureau of War Risk Insurance and the United States Veterans' Bureau, [20] holding plaintiff not permanently and totally disabled, is final, and that such determination was not an abuse of the powers granted to the said Bureaus under said acts.

13. The Court erred in finding that, in determining the question of permanent and total disability under the War Risk Insurance Act and acts supplemental thereto, it is immaterial that plaintiff's condition is probably due more to congenital defects and hysteria incited by weak yield-

ing to desire for insurance payments, than to war service ailments.

14. The Court erred in finding that there is no reasonable probability that the plaintiff will recover from any disability or ailment he may be suffering from.

15. The Court erred in finding that an ailment or disease, even though curable, constitutes permanent and total disability of the one afflicted therewith within the meaning and intent of the War Risk Insurance Act and acts supplemental thereto, when the one so afflicted has been dispossessed thereby of any substantial earning power, and there is reasonable probability that such disability will continue for an indefinite time.

16. The Court erred in failing to find that plaintiff, if afflicted at all, was afflicted with an ailment or disease that is curable.

17. The Court erred in finding that under the War Risk Insurance Act and acts supplemental thereto, permanent and total disability has like import and determined on the same basis and by the same rules, whether or compensation or insurance.

18. The Court erred in finding that in the event of disagreement under the provisions of the War Risk Insurance Act and acts supplemental thereto, the whole matter of the insured's disability is at large and open to contention, and the Court is not restricted to a review of the bureau's judgment. [21]

19. The Court erred in finding that the bureau,

practically from the beginning of his discharge from the Navy, has rated defendant under his contract of insurance, as permanently and totally disabled.

20. The Court erred in finding that the regulations defining permanent and total disability under the War Risk Insurance Act and acts supplemental thereto, as adopted by the Bureau of War Risk Insurance and the United States Veterans' Bureau were in excess of authority.

21. The Court erred in finding that the regulations defining permanent and total disability under the War Risk Insurance Act and acts supplemental thereto, as adopted by the Bureau of War Risk Insurance and the director thereof and the United States Veterans' Bureau and the director thereof, were repugnant to and in contravention of the meaning and intent of said acts.

22. The Court erred in failing to find that the War Risk Insurance Act and acts supplemental thereto provide for a special statutory kind of insurance and that the contracts of insurance issued under said acts are not governed by the rules and principles of law governing other kinds of insurance.

23. The Court erred in failing to find and adopt the findings of fact submitted by the defendant.

24. The Court erred in approving and adopting and making findings of fact and conclusions of law, in accordance with such submitted by plaintiff, even with the modifications made by the Court to paragraph 4 thereof.

25. The Court erred in not rendering judgment herein in favor of defendant and against plaintiff, for the reason that the plaintiff's contract of insurance had lapsed for nonpayment of premiums and had terminated before commencement of suit, and for the further reason that plaintiff was never permanently and totally disabled while his contract of insurance was in full force and effect. [22]

26. The Court erred in rendering judgment herein in favor of plaintiff and against defendant.

27. The Court erred in entering herein a judgment in favor of the plaintiff and against the defendant.

WHEREFORE, defendant prays that said judgment be reversed and said District Court be directed to enter judgment herein in favor of defendant, as prayed for in the answer of defendant, and such other and further relief as to the Court may seem proper.

JOHN L. SLATTERY,
United States Attorney for the District of Montana,

W. H. MEIGS,
RONALD HIGGINS,
Assistant United States Attorney for the District of Montana,

Attorneys for Defendant.

Filed Jan. 22, 1924. C. R. Garlow, Clerk. [23]

Therefore, and on January 25, 1924, order modifying decision and judgment was filed herein, being in the words and figures following, to wit:

United States District Court, Montana,

No. 948.

McGOVERN

vs.

U. S.

ORDER MODIFYING DECISION AND JUDGMENT.

Herein, and within the term, the decision and judgment are modified in that the allowance for attorneys' fees is fixed at 5% instead of 10% originally.

See Sec. 1, Act, May 20, 1918.

BOURQUIN, J.

Jan. 25, 1924.

Filed Jan. 25, 1924. C. R. Garlow, Clerk. By H. H. Walker, Deputy. [24]

Thereafter, and on January 29, 1924, order allowing writ of error was duly filed herein, being in the words and figures following, to wit:

In the District Court of the United States, District of Montana, Great Falls Division.

HERBERT H. McGOVERN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER ALLOWING WRIT OF ERROR.

On this 29th day of January, 1924, the above-named defendant, appearing by its attorney, Ronald Higgins, Assistant United States Attorney for the District of Montana, and filing herein and presenting to the Court its petition praying for the allowance of a writ of error, and assignment of errors intended to be urged by defendant, and praying also that a transcript of the record and proceedings and papers, upon which the judgment herein was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had, as may be proper in the premises;

Now, on consideration thereof, the Court does allow the writ of error as prayed for by defendant.

BOURQUIN,

Judge of the District Court of the United States for the District of Montana.

Filed Jan. 29, 1924. C. R. Garlow, Clerk.

Thereafter, and on January 29, 1924, writ of error was duly filed herein, which original writ of error is hereto annexed, being in the words and figures following, to wit: [25]

In the District Court of the United States, District of Montana, Great Falls Division.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

HERBERT H. McGOVERN,
Defendant in Error.

WRIT OF ERROR.

The United States of America,—ss.

The President of the United States of America to the Judge of the District Court of the United States, for the District of Montana, GREETING:

Because in the record and proceedings, as also in the rendition of judgment of a cause in the said District Court before you, between Herbert H. McGovern, plaintiff, and the United States of America, defendant, a manifest error has happened, to the great damage of the said United States of America, as by its petition and assignment of errors herein appear; and, we being willing that the error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal,

distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you may have the same in the city of San Francisco, State of California, in said Circuit, within thirty (30) days from the date hereof, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done. [26]

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 29th day of January, 1924.

[Seal] C. R. GARLOW,
Clerk of the District Court of the United States for the District of Montana. [27]

[Endorsed]: No. 948. In the District Court of the United States, District of Montana, Great Falls Division. United States of America, Plaintiff in Error, vs. Herbert H. McGovern, Defendant in Error. Writ of Error. Filed Jan. 29, 1924. C. R. Garlow, Clerk. [28]

Thereafter, and on January 31, 1924, a citation duly issued herein on January 29, 1924, was filed, which original citation is hereto annexed and is in the words and figures following, to wit: [29]

In the District Court of the United States, District of Montana, Great Falls Division.

UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
HERBERT H. McGOVERN,
Defendant in Error.

CITATION ON WRIT OF ERROR.

The United States of America,—ss.

To Herbert H. McGovern, Defendant in Error, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, in said Circuit, thirty (30) days from and after the date of this citation, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Montana, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Dated this 29 day of January, 1924.

BOURQUIN,
Judge of the District Court of the United States for the District of Montana. [30]

Due and legal service accepted and copy received this 30th day of January, 1924.

LOY J. MOLUMBY,
CHAS. DAVIDSON,
Attorneys for Defendant in Error. [31]

[Endorsed]: No. 948. In the District Court of the United States, District of Montana, Great Falls Division. United States of America, Plaintiff in Error, vs. Herbert H. McGovern, Defendant in Error. Citation on Writ of Error. Filed Jan. 31, 1924. C. R. Garlow, Clerk. By H. H. Walker, Deputy. [32]

Thereafter, and on January 31, 1924, acknowledgment of service of papers on writ of error was filed herein, in words and figures following, to wit:

In the District Court of the United States, District of Montana, Great Falls Division.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

HERBERT H. McGOVERN,
Defendant in Error.

ACKNOWLEDGMENT OF SERVICE OF PAPERS ON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH JUDICIAL CIRCUIT.

Due and legal service of the petition of the above-named plaintiff in error for writ of error, to the

United States Circuit Court of Appeals for the Ninth Judicial Circuit, assignments of errors of said plaintiff in error, order allowing writ of error, citation and writ of error, and bill of exceptions of said plaintiff in error herein, praecipe for transcript of record and receipt of copies respectively thereof in the above-entitled cause, are hereby admitted this 30th day of January, 1924.

LOY J. MOLUMBY,
CHAS. DAVIDSON,
Attorneys for Defendant in Error.

Filed Jan. 31, 1924. C. R. Garlow, Clerk.

Thereafter, and on February 7, 1924, bill of exceptions was signed, settled and filed herein, being in the words and figures following, to wit: [33]

In the District Court of the United States, District of Montana, Great Falls Division.

Case No. 948.

HERBERT H. McGOVERN, Jr.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED that this cause came on regularly for trial on the 27th day of June, 1923, at Great Falls, Montana, before the Honorable

George M. Bourquin, Judge of the above-entitled court, sitting without a jury. Messrs. Loy J. Molumby, J. McPherson Gault and W. H. Radermacher appearing as counsel for plaintiff and Mr. Ronald Higgins, Assistant United States Attorney for the District of Montana and Mr. L. A. Lawlor, Attorney for the United States Veterans Bureau, Washington, D. C., appearing as counsel for the defendant.

Whereupon the following proceedings were had and the following evidence submitted:

TESTIMONY OF F. L. CAREY, FOR PLAINTIFF.

Thereupon F. L. CAREY, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. MOLUMBY.

My name is F. L. Carey. I live at 2116 First Avenue North, Great Falls. I have known the plaintiff, Herbert McGovern, for approximately six months. I have observed his physical and mental condition upon frequent visits which I made to his room. Up until the last month or six weeks I have been visiting him, I would say, on an average of three times a week; [34] sometimes there would be nearly every day in the week. Six months ago I was appointed chairman of the sick committee of the American Legion.

Q. What, if anything, have you noticed in his condition?

(Testimony of F. L. Carey.)

Mr. HIGGINS.—May it please the Court, at this time we object to this line of examination because it can only have a bearing upon plaintiff's condition during the last six months and it has not been shown that such has ever been submitted to the Bureau, and anything that this witness might testify to would not be the basis of a disagreement on the part of the Bureau and the insured; for the further reason it has not yet been established that there is an existing contract of insurance. We deny that the contract of insurance continues to exist and that it is in a state of lapse.

Mr. MOLUMBY.—The pleadings admit there is a disagreement between the Bureau and the Director of War Insurance and the plaintiff, and of course the reason I have not taken it from the date of his discharge is because that witness is not here.

The COURT.—All right, the objection will be overruled. If the evidence is not competent, the Court will give it no consideration in making up its decision.

Mr. HIGGINS.—May we take an exception?

The COURT.—It will be noted.

A. Well, upon several occasions, when calling on him he would go into a fainting spell, or a fit, I guess it would be more properly called. The fits are not all exactly the same. The beginning of them are practically the same, with one or two exceptions which I have noted. He will be carrying on a conversation very rationally, and if he is reclining or standing or sitting, it doesn't seem to make any

(Testimony of F. L. Carey.)

difference, if one of those fits is coming on, generally his eyes will cross to begin with, and then if he is in a sitting position he will start going over; he doesn't go fast; not quite as slow, however, as I demonstrated, but whichever way he is leaning when it comes on he naturally falls in that direction. After he falls, if he falls on the floor from a sitting position, sometimes he will remain quiet for a time, and as he starts coming out of them—if the Court please, I am describing two kinds of fits that he has; the first kind he doesn't say anything at all in these [35] fits—as he begins to come out of them he will straighten up on the floor, if he is on the floor, or if he is in the bed he also straightens out, and if he is in the bed as he comes out of them he stretches his arms out, his fingers are in about that shape, and his toes will straighten up, and rise up from the center of his body on his heels and his head, and then he will snap out of it and generally take up the conversation just where he left off when he went into this fit. Sometimes when he goes into these fits he does considerable talking, apparently is carrying on a conversation as a rule with two fellows that was in the engine-room with him on this sub-chaser that he was on during the war. One of the fellows that he talks of mostly is, I believe, Harry Vial, and the other fellow I think he calls "Red"; I don't recall Red's name. I have heard him issue instructions to these two men in particular and also to other men in the engine-room, whom he did not call by name that I

(Testimony of F. L. Carey.)

recall. His instructions are very comprehensive, and I imagine a marine engineer would understand them. There is a good deal about them that I do not understand myself, but they will carry on the conversation, and they generally go through about it from submarines, and whenever these G. I. cans are fired he will jump, and that will keep up, maybe sometimes it will be only once or twice and again he will jump five or six times.

Q. Explain what you mean by G. I. cans.

A. G. I. cans is a common term for a big torpedo.

Q. Where is that fired from? From the boat he is on?

A. It is fired from the stern or rear end of the boat that he was supposed to be on, and he will jump at about the interval I should judge upon which this shot is fired, and he often makes remarks to the other fellows who are supposed to be there in the engine-room with him, "We almost got that one"; and then sometimes they do get one; they will see the oil coming to the surface of the water, and then the submarine itself will come up and they can see Germans on deck, on top of the submarine; and I have heard him discuss with these other men the fact that it was a shame to sink such a lot of good machinery, to be [36] lost, no salvage, etc. And one time he was going to recommend that these two other men, this "Red" and Harry Vial, he was going to recommend them for promotion, but they evidently declined to ac-

(Testimony of F. L. Carey.)

cept, and he said, "All right, boys, I would like to see you get ahead, but if you would rather stay here with me I am tickled to death to have you." The duration of these fits vary; from my observation, when he goes into a talkative fit it lasts longer than one in which he does not talk, and as he is coming out of a talkative fit he apparently has another fainting spell for he ceases talking and then comes out after that. I would say from my observation I have seen him in fits that would last at least one hour, possibly longer; I have never timed them; some of them would only last two or three minutes. His eyes seemed to cross before he went into a fit. While he is having a fit his eyes are movable. They roll around some. I have never seen him bite his tongue. The only matter talked about during these fits, that I recall positively, was when Molumby flew to Salt Lake, the first sign of the fight; it worried McGovern considerably; he talked about that. I cannot recall positively having heard him speak of anything else. The length of my visits were varied; if he was feeling pretty well I would drop in for a few minutes and sit with him and visit a few minutes, then go, but if he was bad, I would stay longer. I mean if he was having fits right along. On one occasion I stayed practically all night with him, and the next night I went down again with Father Callaghan and we stayed that night, I think pretty well towards morning again, about two o'clock, I should judge. That first night that I was there I believe he was worse than

(Testimony of F. L. Carey.)

the second night. That one night in particular, which was the night following the day on which Mr. Cook, a disabled veterans commander, was here, he had one fit right after another, practically all the time that I was there. Evidently Mr. Cook, I understand, went down to call on him the day before and Cook reminded him of some doctor that had abused him in some hospital, and he took a fit, I believe, as soon as Cook got in the room and he didn't get over it for several days. It was just the resemblance of those two men. Instances similar to that bring on these fits, most of them excitement, or in the presence of a stranger will [37] often do it. Yesterday down at my office, he and his father and I was talking of him, and I called our secretary and treasurer in and introduced him to Mr. McGovern, that he was a little excited and in a very short time he had one of those fits; similar occasions, any excitement or some recollection, something which brings up his service in the navy, if he gets excited about it, he talks of some doctor against whom he has a real or imaginary grievance will bring them on. I cannot say that I have observed how strenuous exercise will affect him. I have never seen him take very strenuous work. He has never worked since I have known him. In my opinion he is not able to do any work.

Cross-examination by Mr. HIGGINS.

I have known plaintiff approximately six months and the only observation I have made of him has been during the past six months. I am collection

(Testimony of William P. Callaghan.)
manager for the Equity Insurance Company. I do not hold any position with the American Legion only as chairman of the sick or hospital committee.

TESTIMONY OF WILLIAM P. CALLAGHAN, FOR PLAINTIFF.

Thereupon WILLIAM P. CALLAGHAN, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. MOLUMBY.

My name is William P. Callaghan. My home is 410 Second Avenue, Southwest. I am acquainted with the plaintiff, Herbert McGovern. I have known him about six months. I am on the sick committee with Mr. Carey. I act as chairman of the Legion. I have visited or seen Herbert McGovern once a week during these six months. I heard the testimony of Mr. Carey. I have observed, as he described, these fits that he had; I have observed Mr. McGovern going through those motions pretty much the same as Mr. Carey described them.

Mr. HIGGINS.—May it please the Court, we desire to have that answer stricken out as not responsive to the question, and we desire also permission of the Court to have a general objection made to all of this line of testimony. [38]

The COURT.—You may have it. I think it is fairly responsive; motion denied.

(Testimony of William P. Callaghan.)

Mr. HIGGINS.—May we have a general objection to this line of testimony?

The COURT.—You may.

A. I have never seen him in as bad a one as that night he has described, and I was called over there; he was very sick. I would say about the longest time I have seen him is about five minutes. When he would take one of these fits about the first thing you would notice he would move his eyes or something like that. Whenever I had been there in the room, when he would be in one of these fits, we would be quiet until he came out, and he would come out and he would stretch his arms and sometimes raise himself, it seemed like stretching himself from here up, and place his head back or kind of bracing himself with his feet, and he would, if he would faint again, he would sort of tremble, and if he did not faint again he would come out and he would take up the conversation where he had left it off and we would continue talking as if nothing had happened. I do not know that he bites his tongue. As to the bringing on of one of these fits, if there are a number of people in the room and they are strangers to him, which may excite him, or some worry that is on his mind, something that he is thinking about, that makes him nervous.

Q. Has he been, in your opinion, able to do any work during the time that you have known him?

Mr. HIGGINS.—We object as calling for an expert opinion, the witness not being qualified.

(Testimony of William P. Callaghan.)

Mr. MOLUMBY.—A conclusion that he is qualified to make.

The COURT.—Oh, I think he may state what he observed, what conclusions he would draw from it in respect to that. How much weight will be given to it or whether competent will be later determined. Let the objection be overruled and exception noted.

A. In my opinion I would consider him unable to work.

Cross-examination by Mr. HIGGINS.

I have only known McGovern for the past six months and not very well at that. I am an officer of the American Legion. [39]

TESTIMONY OF LOY J. MOLUMBY, FOR PLAINTIFF.

Thereupon LOY J. MOLUMBY, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

My name is Loy J. Molumby, Great Falls, Montana. I am a practicing attorney. If counsel does not object, I will just make the statements without questions.

Mr. HIGGINS.—May it please the Court, if Mr. Molumby's testimony is going to be along the line of Mr. Carey and Father Callaghan, we desire to register the same objection to his testimony as was registered against the testimony of Mr. Carey.

(Testimony of Loy J. Molumby.)

The COURT.—It may be noted. Overruled. If not competent, the Court will give it no consideration.

Mr. HIGGINS.—Exception.

WITNESS.—(Continuing.) I have known Herbert McGovern since some time the middle or last of October or first of November, 1920. He was brought down here by Frank McDonnell from Kalispell for physical examination. I have known him more or less intimately ever since that date and have had an opportunity of observing his condition closely, seeing him practically every day up until the last month, from last October. And having seen him every day for about a month after first meeting him, and having seen him several times while he was in Minneapolis in the hospital, for practically a year I believe, during that time it was about a year when I only saw him once or twice, I don't remember the duration of time he was in the hospital at Minneapolis, but it was during that period of time. When I first observed his condition I was attracted principally by his nervous demeanor, sort of wild look in his eye, rather might perhaps better be described as a scared look in his eye. At that time he weighed about 160 pounds, not more than 160 pounds; perhaps he might have weighed 165 at the very outside. He was sent to the Columbus Hospital, where I visited him every evening, or practically every evening, and was there about I believe two weeks. During that two weeks I observed but one fit such as [40]

(Testimony of Loy J. Molumby.)

described by Mr. Carey and Father Callaghan; that was of short duration, perhaps two or three minutes. Subsequently he was sent to Minneapolis and was there confined in the hospital; I did not see him until after he had been there three or four months; I went to Minneapolis and visited him and found that he—or while I visited him at that time he had three or four fits of a similar nature.

Mr. HIGGINS.—We object to that, and move it be stricken out as hearsay.

WITNESS.—(Continuing.) Hearsay? I noticed it. I say, while I was in his presence in the city of Minneapolis in the Asbury Hospital he had three or four fits of a similar nature as that described by Mr. Carey and Father Callaghan. Still later, after he was discharged from the hospital and placed by the Government in a shack out on Lake Minnetonka I spent three weeks with him, slept with him. He had on an average of five or six fits a day, sometimes as high as twelve or fifteen. How many he had at night after I went to sleep I can't say; he was having them frequently at night. I have observed him fall in the road where there was nobody around him, when everybody was in town, come back from Minneapolis and find him lying unconscious in the middle of the road in a fit such as described by Father Callaghan and Mr. Carey. I have been out to the neighbors and come back, during these three weeks that I was living with him, and discover him lying on the floor in

(Testimony of Loy J. Molumby.)

a similar fit. Subsequent to that three weeks I did not seen him for a couple of months, probably might have been three or four months—my memory is not exact in the matter—until after he returned to Kalispell, and I again saw him, I believe, on two or three occasions. One was the occasion of the American Legion Convention up there, which is most distinctly in my mind, and he at that time was bedridden, was unable to be up, and I observed him then in a couple of fits of a similar nature. Since then he has been here, and I have seen him ever since last October on an average of—well—I have seen him daily until up about a month ago, rather two months ago, when I have seen him practically two or three times a week, and during all that time he has had on an average of from ten to twenty fits a day, that is, counting a day as twenty-four hours. The fits have been such as Mr. Carey described; and [41] such fits as I have observed, they range all the way from one minute—I have seen him in fits that lasted as long as four hours. The long fits are ones that are generally brought on by extreme excitement or exertion; for instance, if he gets out and fools around with some of the children in the yard or plays to any extent, particularly in the sun, he will have severe fits in the evening or at night, and if anything happens during the day that excites him, and matters of a controversial nature will excite him, little slights will excite him, he will get it into his head somebody has something in it for him, some of his best

(Testimony of Loy J. Molumby.)

friends; he can't keep his friends very long because any little thing that they do appeals to him as a slight and makes him believe that they want to do him some harm. When he first came down from Kalispell his father was sick and unable to take care of him; he has always had more or less confidence in me; I acted as his guardian for probably six months or a year, I can't recall exactly, as his legal guardian appointed by the Court, and was later discharged at the request of the Veterans' Bureau rather than at his request, and through my connection with him he has naturally got more or less confidence in me; and he was having some trouble with his neighbors in Kalispell, he thought they were trying to stir up trouble between he and the Veterans' Bureau, didn't seem to appreciate him, so he came down to Great Falls and since then I have taken care of him and fed him, first down at the Rainbow Hotel and later at the Savoy Hotel and finally got him at a house where can do more tinkering around and occupy his mind, if not altogether off his disability. These fits, as I have observed, have been generally brought on by a state of excitement or noise or any exertion on his part. He has no warning himself of such fits coming; they come on him, as far as he is concerned, suddenly. I can tell ahead of time that they are coming from some of his actions, more particularly when he takes certain kinds of fits, as a rule he crosses his eyes and looks at his nose and sort of rolls his eyes before he falls. I have observed him

(Testimony of Loy J. Molumby.)

in other conditions than those mentioned by Mr. Carey, and none of the things [42] mentioned by Mr. Carey has escaped my observation; I have seen him in every action that Mr. Carey described. On other occasions I have heard him sit and talk of a strait-jacket; evidently he has been placed in strait-jackets in different hospitals in which he has been, and the actions he goes through in such fits he directly simulates the straining of an individual in a strait-jacket; he will throw his neck up in the air, move it around, grits his teeth and strain on his arms and on his legs; when he is in such a fit his hands become rigid, his fingers slightly bent and his toes extended; when he snaps out of the fit, which generally lasts, that kind, from an hour to an hour and a half, he is unable to straighten his fingers out and he is in severe pain and cramped and yells for help, and in order to straighten his fingers out it has been necessary for me at times to place my knee on his elbow or the crook of his arm and use all my strength bearing down on his fingers to straighten them out. The same thing is true of his toes; I have had to put my knee on his leg and pull back on his toes with all my might to straighten his toes out. I have seen him go into these fits from a sitting position, standing up, and when he was lying in bed. I have seen him throw a fit of that kind on the street and fall on the pavement; seen him standing at the head of a stairway, have a fit in that way and fall all the way down the stairs; I have seen

(Testimony of Loy J. Molumby.)

him fall against a door and on numerous occasions injure himself, cut himself very severely and raise bumps on his head. I have seen him, on one occasion, fall and knock a tooth out of his mouth. On several occasions I have heard him speak of other things rather than those mentioned; I have heard him speak of the battle which Mr. Carey described, and he described it about as closely as I could; I have heard him speak of the doctors whom he believes have mistreated him, particularly the doctors in the Minneapolis Sanitarium, and I have heard him insist that he was not going to take dope, take any more morphine; I have heard him insist or beg not to be placed in a strait-jacket, and beg not to be whipped; and on the [43] other occasions when he has been out, I have heard him talk particularly about the captain of the boat on which he was machinist mate, I believe; he seemed to have considerable difficulty with the captain burning lights in his cabin and thus running down his batteries, and that seemed to excite him greatly, and numerous things that happened of that nature while he was in the service are recalled to him while he is in one of these fits.

Mr. HIGGINS.—We object to statement of counsel, "Numerous things are recalled to him while he was in the service," same not being known to the witness.

The COURT.—Overruled.

WITNESS.—(Continuing.) I said "seemed to be," such as the two matters I have mentioned,

(Testimony of Loy J. Molumby.)

this battle and the engine-room trouble with the captain. He has on other occasions spoken in an admiring way of the engine and discussed with other members of the crew how they could better the working of the engines, discussed the value of different oils they used, and matters of a similar nature, gone into in great detail in one of these fits, because they generally last an hour and a half, and during that particular hour and a half, or hour, or four hours, whichever the case may be, he seems to feel that he is back on board that ship.

Cross-examination by Mr. HIGGINS.

I am not certain that I have known McGovern since November 1, 1920. I am not certain of the date he came down here from Kalispell. It was just about a week or two prior that he was examined by Dr. Southmayd; if I remember correctly, it was the first of November or possibly the last of October, not before then. I am one of the attorneys of record for the plaintiff in this action. I am State Commander of the American Legion. The American Legion had the convention in Kalispell, Montana, I believe, in June or July, 1922, and McGovern was there at that time. He stayed up there until October of that year. I believe it was October, probably the first of October of that year. I was, at one time, appointed guardian of McGovern, because the Court of Cascade County thought he was incompetent, by incompetent, I mean insane. I was afterwards discharged.

Q. Has his condition changed so far as his

(Testimony of Loy J. Molumby.)

mental state is concerned, since [44] the day of your appointment as guardian?

A. I think it has. I think he has become worse.

Q. You think that he is more insane now than he was at that time?

A. Well, it is a form of insanity, yes.

Q. Do you think that he is now an incompetent?

A. I believe he is, absolutely. I would like to go further into that matter of guardianship, if you will allow me. The reason that I was discharged as guardian was not because his condition had improved, but he was at that time in Minneapolis and under the care of doctors there, and they believed, I think—I can't say exactly what they thought about the matter, but it is my opinion that—the discussions with the doctors there—that it would be best for his mental attitude towards things if I would be discharged, because the doctors' correspondence with his father and myself and the Red Cross here gave me the impression that McGovern had gained the impression while he was in the hospital that I was trying to steal his money and everything of that kind, and it was preying on his mind that I was his guardian rather than his father, and he felt he didn't need one. That is the reason, I presume, for my discharge. After McGovern got out of the hospital in Minneapolis, he returned to Kalispell, his home. He was in Kalispell during the summer of 1922, I believe, up until about the first of October, I am not certain about the date.

TESTIMONY OF HERBERT McGOVERN, SR., FOR PLAINTIFF.

Thereupon HERBERT McGOVERN, Sr., a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. MOLUMBY.

My name is H. H. McGovern, Sr. I am the father of the plaintiff in this action. The boy has, since his discharge from the army, been living more or less with me, except when he was in the hospital. I believe it was some time in November, 1918, if I am right, that I first saw him after his discharge from the navy. I believe it was in October, 1918, when he was [45] discharged. It was before the armistice was signed. I saw him within a month or so afterwards. My recollection is that he weighed about 165 or 170 pounds when he first got out.

Q. What was his general weight before he entered the navy?

Mr. HIGGINS.—We desire to object to the testimony of this witness, largely on the same ground as the objection to the testimony of the witness Carey. This has never been presented to the War Risk Insurance organization and no chance for a disagreement.

The COURT.—Very well. Proceed.

Mr. HIGGINS.—Exception.

A. Prior to his entry in the navy I think his weight was approximately 175 or 160 pounds. I

(Testimony of Herbert McGovern, Sr.)

first saw him at Portland after he got out of the navy.

Q. And what did you observe in his physical condition at that time?

A. I observed that he was generally run down,—

Mr. HIGGINS.—It may be understood we are objecting generally to this examination?

The COURT.—Yes.

Mr. HIGGINS.—And except to it.

A. —and that he had a bad cough, especially at nights I notice he had a bad cough, coughed throughout the night and that he was quite nervous. He stayed in Portland for quite a little while. I don't recall now just what length of time; he stayed at home quite a little bit then, and afterward he went back and entered the hospital. It has been a case of hospital for the past five years off and on, or when he wasn't he was at home with me or with some friends.

Q. Now, in regard to his condition as you observed it, with regard to his nervous condition, nervous fits or fainting spells, whichever they are, will you describe to the Court what you have observed in regard to these fits?

A. Any excitement, most any excitement, or any— [46]

Mr. HIGGINS.—We object to the question as being indefinite, uncertain, not specifying dates.

The COURT.—Overruled. Proceed.

Mr. HIGGINS.—Exception.

A. He is subject to those sinking spells. They

(Testimony of Herbert McGovern, Sr.)

apparently come without warning at all. He takes some very hard falls and he is liable to fall on to anything; apparently without any warning at all they come: he might often take a cup to drink, take a taste or drink of anything, and just at the time when he might open his lips he would fall down entirely, just as if shot. He remains in one of those spells from a few minutes to two or three hours. During those fits his eyes are dilated and apparently set. He rolls them around. He sometimes has several fits a day. He has done no work whatever, absolutely none, to my knowledge, since his discharge from the navy. I have tried several times to find some light work that he could do but he cannot do it. He has been having the sinking spells since he returned. He lived with me before his entry into the navy. He was in the best of health and very active. Aside from his nervous condition and this cough since his return from the navy you can notice in his *gate* when he walks there is a sort of a motion to his walk that, I cannot hardly describe it, I might say—

Q. Shuffling?

A. Yes, something of that order, and that may be discovered by anybody any time; that has occurred since.

Mr. HIGGINS.—We object to the question and move that the answer be stricken out. There is no allegation or claim that plaintiff was suffering from anything except mental disorder and tuberculosis.

(Testimony of Herbert McGovern, Sr.)

Mr. MOLUMBY.—It is just a symptom.

The COURT.—Motion denied.

Mr. HIGGINS.—Exception.

A. He has a hacking, dry cough, apparently, I would call it; he coughs quite often, several coughs in quick succession. He has coughed up blood [47] on many occasions. He sometimes has those night sweats. As far as I have observed that condition has existed since he got out of the navy.

Cross-examination by Mr. HIGGINS.

I cannot recall how long I saw my son in Portland after his discharge. That has been several years ago, five years ago, I believe, or nearly so. I couldn't tell you the exact time.

Q. He didn't have any fits, did he, when he was in Portland?

A. Well, he had these sinking spells.

Q. When you met him in Portland?

A. Yes, sir.

Q. Did you ever make an affidavit to that effect and send it in to the Bureau of War Risk Insurance?

A. I don't know that I did. I may have but I don't recall that I did. It is probably true that I did not. I may not have put it in an affidavit concerning the so-called sinking spells or what I term sinking spells, but I have written the department fully. My letters are on file there, fully describing this matter. I may not have made affidavits. I thought it was unnecessary for me, dealing with the Government, for me to get out and make any

(Testimony of Herbert McGovern, Sr.)

more than a statement as I saw it. I have tried to put the plaintiff to work; he was willing; he would do anything I told him if it was in his power. He has been very obedient to me in that respect and would do anything he could. I have tried him several times. As a last resort, the last time I attempted that I took him down to where I had a repairing mill to repair a small boiler; I thought possibly he might be able to look after that, but he had not been there, I think, more than thirty minutes until he fell over against the boiler and that is the last time that I—

Q. Do you mean to tell us, Mr. McGovern, that a son of yours, suffering from these spells, you put him to work near a hot boiler?

A. It was a little room; I could watch him and see what was going on. I thought possibly I could watch him and look after him. That was the best thing I could think of. I live at Kalispell and am in the lumber and logging [48] business. I have an automobile. My son was in Kalispell last summer, the summer of 1922. I forget what time he come away but it was last fall sometime. I believe it was October or November he left there.

Q. He drove your automobile while he was there last summer?

A. Yes, he did sometimes when there was any beside him.

Q. He never drove it alone?

A Well, I don't think so.

Q He was still having those spells at that time?

(Testimony of Herbert McGovern, Sr.)

A. Yes, as to the number, well that would depend, some days there might be several and other days there might not be any. I am not a doctor; I couldn't give you any information as to his lungs. He still coughs and spits up blood.

Q. He is quite a cigarette fiend, isn't he, Mr. McGovern?

A. Well, he smokes cigarettes. That is one habit he got while he was away. There was never any cigarettes smoked in my house until this came up. I presume he smokes several packages of cigarettes a day. I don't know how many he smokes, I couldn't say, but I know at one time when he was on a chaser there was word come home to me that he had been given two thousand at one time.

Q. Now, your son has been endeavoring to get insurance ever since he retired from the service, hasn't he? Shortly thereafter?

Mr. MOLUMBY.—I object to that question. Counsel has been contending that he has never made any contention for it or asked for it. It has been the basis of his objections to the testimony.

Q. I will say this, Mr. McGovern, that he has felt that he ought to have compensation or insurance? A. Yes.

Q. And it has been rather an obsession with him, hasn't it, Mr. McGovern?

A. Yes; the explanation he has given to me is this—

Q. You say that it has been?

A. I can only tell you what he said. [49]

(Testimony of Herbert McGovern, Sr.)

Q. All right, tell us.

A. He said that the soldier was to have compensation and that many of them were getting it and that he could not understand why he should not share the same as others. I think he is getting forty dollars a month.

Redirect Examination by Mr. MOLUMBY.

I don't know that I have ever personally put in any affidavits at all in regard to this case. I don't know that I have ever been asked to sign any affidavits at all. I may have, but I don't recall. Most that I done in this matter was correspondence, just by letter with the hospitality or place where he has been. I don't recall whether or not he ever put in his application for compensation or where. I do not think it was done while he was in Kalispell. It was handled by somebody else at some other place. I have never actively taken any part in handling this case, except that I have had one feeling in this matter, that I have felt, in as much as his condition is as it is that it would be a great blessing to have this thing adjudicated and settled, so that there wouldn't be that feeling about the unsettled state of it.

Q. Do you know whether or not he ever had any accidents while driving that automobile.

A. I think he did. I have understood he did.

Mr. HIGGINS.—We move it be stricken out as hearsay.

The COURT.—I think so; not of his own knowledge.

TESTIMONY OF LAWRENCE A. LAWLER, FOR PLAINTIFF.

Thereupon LAWRENCE A. LAWLER, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. MOLUMBY.

My name is Lawrence A. Lawler. I am an attorney for the United States Veterans Bureau and am here in my official capacity. I have the original files of the records of the bureau in the case of Herbert [50] McGovern. They contain the different medical examinations given McGovern by the Government, statements made by him and ratings given him by the United States Veterans Bureau. They can be classified as insurance papers, compensation papers and vocational education, and as to doctors examinations, ratings and anything else, such evidence as he, himself, has submitted. Aside from the affidavits, Government doctors reports and ratings made by the bureau, there is correspondence. I couldn't say, offhand, whether the files contain the application made by McGovern's guardian for total permanent disability, together with two doctors statements submitted therewith.

TESTIMONY OF LOLA BELLER, FOR PLAINTIFF.

Thereupon LOLA BELLER, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. MOLUMBY.

My name is Lola Beller. My home is at Kalis-

(Testimony of Lola Beller.)

pell. I am acquainted with the plaintiff and will have known him two years this coming July. He came from a hospital in Minneapolis at that time. He lived next door to my father and mother. He was as much at our place as he was at home. I had opportunity during all of that time to observe his physical and mental condition.

Q. And will you describe to the Court just what you observed in regard to his mental condition, if anything?

Mr. HIGGINS.—We object on the ground that it is indefinite, hasn't specified the time.

Mr. MOLUMBY.—During the time she has known him.

The COURT.—Yes.

Mr. HIGGINS.—I can't tell from the question when this was.

The COURT.—She may answer—since two years ago—overruled.

Mr. HIGGINS.—I desire exception.

The COURT.—It will be noted.

Mr. HIGGINS.—I desire an objection also on the same ground as objection to the testimony of the witness Carey. [51]

The COURT.—Overruled and exception noted.

A. In regard to his condition from the first, he was very nervous, fainting spells and he seemed to have spells of his heart, excited at the least little thing. The length of the fainting spells was from just a few minutes up until hours. During these he always talked about the boys who were on the

(Testimony of Lola Beller.)

boat with him. I don't recall hearing him mention anything else. When he comes out of these fits he shakes all over and then his head will turn back and his feet and he chokes, and raises his body. He has had such similar experiences during the entire time I have known him. During this time I saw him daily. I now live in Great Falls. Have been since April. I have taken care of him here since that time. There has been no change in his condition. At times he is unable to raise his arm; at other times I find his mental condition bad; he has a cough. He coughs until he chokes and then he faints and when he comes out he is sometime better. He has coughed up blood; that was just last month. The frequency of these fainting spells is according to the mental condition and environments. The most often I have seen him have them daily, he comes right out of one and goes into another, as high as fifteen or twenty a day. I never have known him to go a day without any. In these talking fainting spells he imagines he sees some of the boys in his boat getting hurt, and then he talks about the two that were in the engine-room with him and the condition of the engine and the parts of the engine where he was at. I have heard him describing or speaking to other fellows and heard him experience a battle that he was in; seems to be telling the boys just what to do.

Cross-examination by Mr. HIGGINS.

I first saw the plaintiff on the 4th day of July, 1921, and all the things to which I have testified

(Testimony of Lola Beller.)

occurred subsequent to that time. I lived next door to him. I called Dr. Conroy over to see him several times. I couldn't tell you whether Dr. Conroy is here.

Mr. MOLUMBY.—He has been subpoenaed; he will be here, if you need him.

Mr. HIGGINS.—We sure do; I understand he was told not to come here. [52]

A. I have seen the plaintiff since I have been in Great Falls. I have been taking care of him right along. Have been practically his nurse. There has been quite a close friendship between us.

TESTIMONY OF DR. DORA WALKER, FOR PLAINTIFF.

Thereupon Dr. DORA WALKER, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. DAVIDSON.

My name is Dr. Dora Walker. I am a duly licensed and practicing physician in the city of Great Falls. I saw Herbert McGovern yesterday. I X-rayed his chest yesterday.

Q. While you were making your examination, Doctor, did anything occur by way of fainting spells or anything such as that?

Mr. HIGGINS.—We object; if this witness is being put on as an expert, there has been no qualification yet.

The COURT.—She may answer. Overruled.

(Testimony of Dr. Dora Walker.)

Mr. HIGGINS.—Exception.

A. He had one of those attacks within a minute or two after he came into the office.

Mr. HIGGINS.—We object to this line of testimony, may it please the Court, on the further ground that the matter has been submitted to the bureau and no opportunity for a difference between plaintiff and the bureau.

A. In my practice, I have had occasion to examine and study a great many patients afflicted with various diseases and afflicted with diseases of the nerves and neurosis.

Q. Will you explain to the Court—Doctor, you said he had a fainting spell—just what this fainting spell amounted to. Describe it.

Mr. HIGGINS.—Objected to. This witness has not qualified as an expert.

The COURT.—Overruled.

Mr. HIGGINS.—Exception. [53]

A. Well, when he came into the office, I led the way through the office into the X-ray room and I heard him exclaim "Oh!" and I looked around and he was already on the floor when I looked around; he was lying in a fairly comfortable position on the side and had his eyes shut, and there was no convulsion. It lasted about, I would say, less than a minute, possibly a minute and a half, not more than that, when he had a slight convulsion of the right hand, and he raised up his head and opened his eyes and said, "I am all right," and got up and staggered several steps and followed me into the

(Testimony of Dr. Dora Walker.)

X-ray room and had no other evidence of any convulsion or fit. I then X-rayed his chest. I didn't give him a physical examination.

Q. Would you say from the appearance of the man that he appeared normal mentally?

Mr. HIGGINS.—Objected to; the witness has not been qualified as an expert.

The COURT.—Overruled.

A. I was instantly struck, when he came into the room, that this man was below normal mental calibre; he had an expression on his face that was at the same time silly and happy and his talk was rapid and very hurried; and when he came out of this convulsion his expression was the same; it was not one of a person that was perfectly normal mentally.

Q. Doctor, you have had sufficient experience, have you, to determine just what this man went through, just what he was suffering from?

Mr. HIGGINS.—We object, unless it is shown what that experience is.

The COURT.—Overruled.

Mr. HIGGINS.—Exception.

A. It was my impression that this man had a hysterical convulsion. Hysterical convulsions are merely a part of some of the symptoms of hysteria and are probably brought on by some unusual excitement, nervous strain.

Q. I will ask you, Doctor, whether or not a nervous strain, accompanied by tuberculosis might cause hysteria?

(Testimony of Dr. Dora Walker.)

Mr. HIGGINS.—We object again; the witness has not qualified as an expert.

The COURT.—Overruled. [54]

Mr. HIGGINS.—Exception.

A. It is my opinion that any toxic disease, such as tuberculosis, added to a severe mental strain would be at least an exciting cause of hysteria.

Q. And you are of the opinion, from your examination of the plaintiff yesterday, that this man was suffering from hysteria?

Mr. HIGGINS.—We object; no basis for the question.

The COURT.—Overruled.

Mr. HIGGINS.—Exception.

A. I would say so.

Cross-examination by Mr. HIGGINS.

I never saw the plaintiff before yesterday and my conclusion that I have stated here is simply made from the observation I had of him when he fell on the floor and from the observation I made of him yesterday. I didn't time it but I would say that the attack lasted from one to one minute and a half. He fell in a comfortable position on the floor. He didn't hurt himself. He exclaimed "Oh!" and then went down. He came out of it in a minute and a half. He raised his head and said, "I am all right." He had a slight convulsion of the arm, raised his head, started to get up and said, "I am all right." Nobody asked me the question whether I had sufficient opportunity to observe

(Testimony of Dr. Dora Walker.)

this man to tell whether or not he is disabled in any way.

Q. Well, it is more of a conjecture, isn't it, on your part, than a medical opinion, that he is suffering from some kind of hysteria?

A. I don't think I know just what you mean.

Q. You have not had sufficient time to observe this man; he might be faking, mightn't he?

A. I suppose he might be, but I don't think he was.

Q. If plaintiff has been practicing that for several years, he could deceive you, couldn't he?

A. I think he might. [55]

Q. And mightn't that condition be brought on by a determination on the part of plaintiff to obtain War Risk insurance and compensation and by a continued conduct and an effort to deceive people into the belief that he was disabled?

A. Well, if he was very clever I should think he might.

Redirect Examination by Mr. DAVIDSON.

It was my opinion that this attack was a hysterical convulsion; it was not simulated.

TESTIMONY OF DR. J. C. MICHAEL, FOR PLAINTIFF.

Thereupon Dr. J. C. MICHAEL, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. MOLUMBY.

My name is J. C. Michael. I am a practicing

(Testimony of Dr. J. C. Michael.)

physician and specialist in neuro-psychiatric diseases. I was not subpoenaed but requested by the Government to be here as a witness for the Government. I have had opportunity to observe Herbert McGovern. I observed his condition for approximately February, March, April and May of 1921; between four and five months. I rather think I had several opportunities during that length of time and observed him often enough to form an opinion as to what his trouble was.

Q. And will you state to the Court whether or not a fit such as he had and the nervous disorder which he gave evidence of was simulated, affected or whether real?

Mr. HIGGINS.—The question assumes something that has not yet been established by the testimony of this witness.

The COURT.—I think you better see what the Doctor observed first.

Mr. HIGGINS.—And we object also on the further ground that all the testimony that this doctor will give will be subsequent to the 31st day of August, 1919, and it has not yet been established that whatever this witness discovered in the condition of the plaintiff has been submitted to the bureau to be determined upon and be the basis of disagreement.

The COURT.—The plaintiff cannot introduce his case all at once. We will [56] hear it. If not properly material, relevant, it will be disregared. Objection overruled and exception noted.

(Testimony of Dr. J. C. Michael.)

Q. State to the Court what you observed in regard to his condition, Doctor.

A. As I understand, the point of your question is whether the plaintiff was faking?

Q. No, disregard that question, Doctor, and state to the Court what you observed in regard to his nervous and physical condition.

Mr. HIGGINS.—We again object to this question on the same ground as previously stated.

The COURT.—Overruled.

Mr. HIGGINS.—Exception.

A. I saw Herbert McGovern the first time in December, as I recall it, in December of 1920, I was requested to see him in the capacity of attending physician and doing work in neuro-psychology for ex-service men in Minneapolis. He was at that time a patient at St. Barnabas Hospital, a hospital which was caring for a number of ex-service men. I was called to see him by his attending physician because of unusual excitement; the man acted frantically, he refused to have people around him; he seemed very unreasonable; he was under a good deal of emotional excitement. The purpose of my visit was principally to determine the further disposition. The hospital people had complained that they could not care for him because of his excited, nervous state; so I felt convinced that his condition was such that it would be better for the interests of all that he be removed to the Minneapolis Sanitarium, which at that time was under contract to care for mental cases. He was removed. At that

(Testimony of Dr. J. C. Michael.)
time I made a diagnosis of phychosis of a type undetermined—that is a term which means mental disease—but the type I was not able to decide upon because of my very brief time that I was allowed for that purpose.

Q. And afterwards you saw him on numerous occasions, did you not, Doctor

A. Yes. I didn't see Herbert McGovern until, I think it was, February 9th, with the exception of one time in the Minneapolis Sanitarium, and I was just making rounds there and I was introduced to him, but my memory isn't very clear [57] about that interview, except that I remember he answered my questions and said he was from Montana. I remembered having seen him before once upon a time. The Asbury Hospital was, about that time, this was February 9th, approximately, taken over by the United States Public Health Service and operated as a Government hospital exclusively, and we there provided what we thought very excellent accommodations for Herbert, and I saw him in the capacity of attending physician from that time on until his discharge in May, 1919; and during that time he gave evidence of a good deal of emotional excitement and of being very nervous, and was very suspicnous, very suspicious that people weren't doing the right thing by him, especially the Government; very frequently he would tell me sometimes he would get out of bed and suddenly get a spell, his knees would give way. I never saw him have a fainting spell, I never saw him have a hysterical

(Testimony of Dr. J. C. Michael.)

seizure myself. I would visit with him fifteen or twenty minutes, talk to him, and examine him on other occasions and other times, just see him only two or three minutes or so.

Q. You say you never saw him in one of these spells yourself?

A. I don't recall I ever saw him in one of those spells. It was part of my duty to make recommendations to the Government. We base our opinion on all of the information that comes to our notice, not only our opinion, but the nurses' reports and house doctors. They would report from time to time the patients conduct and behavior.

Q. The question I ask you is whether you recall yourself, of your own knowledge whether or not they ever did report such fits in regard to McGovern's case?

A. I would have to ask counsel what does he mean by such fits?

Q. You have heard the testimony sinking spells.

A. Yes, sinking spells, indeed, that has been reported to me. I don't remember reports on fits as have been described by previous witnesses.

Q. Was there anything in your observation, Doctor, of his conduct or condition to lead you to believe that he was simulating or faking? [58]

A. Well that question cannot be answered categorically yes or no. I believe that he was suffering from a condition, the symptoms of which may be determined, especially in degree, by the man's own motives, either conscious or unconscious.

(Testimony of Dr. J. C. Michael.)

Q. That is true of all hysterical persons?

A. That is true of hysterical conditions and of this border-line nervousness.

Q. Hysterical, as that is known to medical science? A. Hysteria?

Q. Yes.

A. Not very pronounced in men usually; it is more pronounced in women.

Q. Men are subject to such?

A. Yes, may have; it has been more common in the army than with civilians.

Cross-examination by Mr. HIGGINS.

As I recall it, plaintiff had no legal guardian when he arrived in Minneapolis from Montana. As I understand it there was a guardian appointed for him after his arrival there. I recommended and expressed an opinion that his condition was such as not to warrant or necessitate a guardian. That was about March; that was after he had been removed from the Minneapolis Sanitarium to the Asbury Hospital; at that time I did not feel the man was mentally disturbed to such an extent that he needed a legal guardian. As to the physical condition of the plaintiff when he came there, well, objectively his nervous system did not show any signs of disease or degeneration; that is, when we look at the patient and everything we can do in examining to convince us whether there is a disease in the nervous system objectively. I didn't find any. As to his appearance, his color seemed good; he seemed fairly well nourished; he is a man

(Testimony of Dr. J. C. Michael.)

of good physique. I didn't examine him particularly with reference to the condition of his lungs, because that was done by a specialist in diseases of the lungs. From what examination I made, I never discovered any lung disorder. I never saw any blood, never saw any hemorrhage or anything like that. He was sent to Minneapolis, primarily, [59] I believe, as I recall it, for lung trouble. I don't think it was quite as soon as three days that he was delivered over to me, I am not certain, but it was a short time after his arrival.

Q. Now he could have simulated those symtoms that he exhibited there?

A. Functional nervous symptoms can be simulated; yes.

Q. And if anyone in the service who had war risk insurance and wanted to put it over on the Government, so to speak, could conduct himself in an effective manner along the lines of the plaintiff and possibly get by with it, couldn't he?

A. I think that is possible, yes. I believe there are such cases. I couldn't say that there are quite a number of such cases. While he was there he improved, we thought considerably while he was at the Asbury Hospital. Sufficiently so to be released to the custody of friends to take him out to some cottage. As to adjustment of his compensation, endeavors were made on our part to bring the matter of compensation to the attention of the War Risk Insurance Bureau at Washington.

Q. And when he learned that he was going to

(Testimony of Dr. J. C. Michael.)

get increased compensation his condition improved, didn't it? Didn't that have some effect or influence upon his mental condition?

A. I think so; I think the man was somewhat relieved by good news of compensation.

Redirect Examination by Mr. MOLUMBY.

I recommended that the guardian be discharged.

Q. Your recommendation in that regard was partially due to the fact it seemed to excite him and worry him a lot, was it not?

A. That was only one consideration, yes. As to my knowledge whether he was sent down there as a nervous or lung patient, and about Dr. Southmayd's recommendation, I think I have seen the report. My information would come from my perusal of the reports. [60]

Q. Do you remember what that report was?

A. No, not exactly. In his case, I brought the matter to the attention of the Veterans' Bureau for the purpose of getting his compensation, just like every other case. To some extent the compensation that was got resulted from the recommendations, not exactly from the recommendations, but rather from the findings that I and the other doctors made, who examined him.

Q. And if you thought he was faking you would not have made a report on which he would get compensation, would you, Doctor?

A. Well, I had not convinced myself that Herbert McGovern was faking.

(Testimony of Dr. J. C. Michael.)

Recross-examination by Mr. HIGGINS.

Q. You doctors are usually very liberal in these things, aren't you?

A. Yes, we give the insured the benefit of any doubt. I never noticed any fits or convulsions of hours of duration, not personally, no.

Q. And you say you saw some sinking spells, or how would you describe them?

A. Well, I would have Herbert stand up during examinations, and I would find him complaining that he was too weak to stand up, and such complaints, but I never saw him swoon, never saw him have any seizure, any cramps or convulsions. He would complain of distress once in a while. As to the expression used here, I never saw him throw a fit nor a convulsion. I don't know of any medical reports of any fits of hours of duration. A man could live who would have from one to fifteen fits a day, from one minute up to four hours or four hours and a half duration.

Q. What would be his condition? Would he remain well nourished or would he become enfeebled?

A. Well, if it was a fit of that duration, due to epilepsy, it would probably enfeeble him considerably, but if it is an hysterical fit it probably would not make very much difference.

Q. That would be very rare for individuals to have fits that many times a day, real fits? [61]

A. It would be rather rare, but not so rare as to be improbable.

Q. Sufficiently rare to make one cautious as to the proof of the reality of the fits?

(Testimony of Dr. J. C. Michael.)

A. Well, hysterical fits are real, very real; the question is the degree of motive that brings them on.

Redirect Examination by Mr. MOLUMBY.

I examined McGovern and saw him on an average of about five or six times per week. This was when I called at the hospital. I stayed sometimes probably only several minutes and sometimes fifteen or twenty minutes or half an hour.

Recross-examination by Mr. HIGGINS.

Q. For what period of time did this continue, Doctor?

A. This was from February to May, 1921; I think it was February 9th to May 14th, 1921.

TESTIMONY OF DR. THOMAS F. WALKER, FOR PLAINTIFF.

Thereupon Dr. THOMAS F. WALKER, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. DAVIDSON.

My name is Thomas F. Walker. I am a physician and live at Great Falls, Montana. In the practice of my profession, I have had considerable experience with the disease known as tuberculosis. I am familiar with the general causes and results of tuberculosis. I have not made any special study of nervous diseases, particularly hysteria, any more than one ordinarily has in their medical training.

Q. Doctor, I will ask you, from your knowledge

(Testimony of Dr. Thomas F. Walker.)

of tuberculosis, whether or not the presence of tuberculosis in the patient accompanied by a nervous shock or a nervous strain might bring upon the disease a malady known as hysteria?

Mr. HIGGINS.—We object; this witness has not qualified himself to answer that question.

The COURT.—You may answer. Overruled. [62]

Mr. HIGGINS.—Exception.

A. I think it would be a predisposing factor, yes, sir. Toxin caused by tuberculosis is injurious to the nervous system.

Q. And a combination of those toxins affecting the nervous system combined with a nervous strain or nervous shock would be sufficient to over-strain and overbalance and cause this hysteria?

A. Yes, sir, in certain individuals it might.

Q. I will ask you, Doctor, whether or not, in your opinion, the fact that a patient is told that he has tuberculosis and is sent from one hospital to another for examination and it broods upon his mind, would that be sufficient to cause hysteria?

Mr. HIGGINS.—We object; there has been no foundation laid for that question, and for the further reason that the witness has not qualified himself as an expert.

The COURT.—While the contingencies suggested by the question may not all be proven, I assume counsel will, or else the opinion would be of no value. I think the Doctor may answer. In so far as not competent it will receive no consideration.

Mr. HIGGINS.—Exception.

(Testimony of Dr. Thomas F. Walker.)

A. Well, that one thing alone probably would not, but that would be an added load to bear and give a mind which was predisposed to this condition, by nervous strain, hardship and so on, it certainly would be an added factor which might tend to overcome a balance.

Mr. HIGGINS.—Move the answer be stricken as not responsive to the question.

The COURT.—Overruled; I think it is.

The COURT.—In other words, it might be a contributing cause?

A. Yes, sir. I graduated in 1912. I didn't see the plaintiff in my office yesterday.

Cross-examination by Mr. HIGGINS. [63]

My practice is equally divided between chemistry and pathology, perhaps a third of my working time is taken up with chemistry, making analyses. I am not a tuberculosis specialist. I am not a nerve specialist. I am not a specialist in mental diseases.

Redirect Examination by Mr. DAVIDSON.

I am not engaged in general practice; I do specialize.

Q. Will you state—

Mr. HIGGINS.—We object, unless a specialist along the lines he has specialized, has a bearing on this case.

The COURT.—I don't know that it is very material, but tendency of medicine has various phases. Overruled.

Mr. HIGGINS.—Exception.

A. I specialize in pathology, chemistry along

with it, medical chemistry. I come in contact with certain phases of tuberculosis and neuro-psychosis.

Mr. MOLUMBY.—If the Court please, at this time the plaintiff would like to introduce these Government records and have them marked.

Mr. HIGGINS.—May we have an objection and exception at this time to the introduction of any of these exhibits bearing upon any feature of this case subsequent to the 31st day of August, 1919, at which time it is claimed the insurance granted plaintiff lapsed?

The COURT.—You may.

Mr. MOLUMBY.—The first exhibit—Plaintiff's Exhibit I—is a discharge from the navy.

PLAINTIFF'S EXHIBIT I.

UNITED STATES NAVAL RESERVE FORCE.
HONORABLE DISCHARGE.

THIS IS TO CERTIFY, That Herbert Hugh McGovern, Jr., Machinist's Mate, First Class, this date has been discharged from the United States Naval Reserve Force,—Four—by reason of Physical Disability, incurred in line of [64] duty. Is not recommended for re-enrollment. Rating best qualified to fill. None.

Dated this 17th day of October, 1918, at Naval Hospital, Fort Lyon, Colo.

GEO. H. BARBER, U. S. N.,
Rear Admiral, Med. Corps., U. S. N.,
Commanding.

ENROLLMENT RECORD.

Scale of Marks: 0, Bad; 1, Indifferent; 1.5, Fair; 2.5 Good; 3.0, Very Good; 4.0, Excellent.

Name—Herbert Hugh McGovern. Rate, MM—1c;
Enrolled—June 19th, 1917, at Puget Sound, for 4 years;
Previous naval service—1⅓ years. Previous Naval Reserve service —— years;
Served apprenticeship ——; Gun Captain certificate ——;
Certificate of graduation P. O. School ——; Seaman Gunner ——;
Trade ——; Citizenship, U. S.; Ratings held during enrollment, Mach. Mate, 2d and 1st Class; Proficiency in rating, 3.2; Sobriety, 4.0; Obedience, 4.0; Average standing for term of enrollment, 3.7; Special qualifications, ——.

(Signed) M. H. AMES,
Lieut. Commander, Medical Corps, U.S.N.

DESCRIPTIVE LIST.

(To be taken from current enrollment record.)

Where born—Shurben, Minn.; Date—Feb. 22, 1893; Age—24 years 7 months; Height—5 feet 9 inches; Weight—158 lbs; Eyes—Brown 2; Hair—Dk. Br.; Complexion—Ruddy; Personal characteristics, marks, etc.—Sc. L. side neck; Large Vac. Sc. L. arm; Many small Scs. L. —knee; M. *etween* scapula; Very large inguinal rings lower arches.

Is not physically qualified for re-enrollment at date of discharge.

Note—This form will be issued on discharge by the reservist's Commanding Officer.

Has insurance for $10,000.00. Last charge Oct.,

1918, for $6.60. Due and Paid on Discharge $23.38.
[65]

(Signed) G. K. HUNT,
Lieut. Pay Corps, U. S. N.,
For J. R. SANFORD,
Comdr. P. S. U. S. N.

Mr. MOLUMBY.—Exhibit 2 is the report of the Bureau of Medicine and Surgery of the Navy Department, showing the history of his medical examinations prior to his discharge from the Navy:

PLAINTIFF'S EXHIBIT II.
UNITED STATES OF AMERICA,
NAVY DEPARTMENT.

Washington, April 6, 1922.

I HEREBY CERTIFY that the annexed is a true copy of the medical record of Herbert Hugh McGovern, Jr., former machinist's mate first class, U. S. Naval Reserve Force, on file in the Bureau of Medicine and Surgery, Navy Department.

E. R. STITT,
Chief, Bureau of Medicine and Surgery.

OFFICE OF THE SECRETARY.

I HEREBY CERTIFY that E. R. Stitt, who signed the foregoing certificate, was at the time of signing Chief of the Bureau of Medicine and Surgery, and that full faith and credit should be given his certification as such.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the Navy

Department to be affixed this eighth day of April, one thousand nine hundred and twenty-two.

T. ROOSEVELT,
Acting Secretary.
Washington, D. C.,
P. R. & R.

Mar. 20, 1922. [66]

To: Veterans' Bureau,
Washington, D. C.

Subject: Case, C–193, 312. Herbert Hugh McGovern, Jr.

Reference: Call of

In the case of the above named the records of this bureau show as follows:

Born: Place—Sherben, Minn. Date 2/22/93.

Enlisted: Place—Puget Sd. Wash. Date 7/19/17.

Discharged: Place—Fort Lyon, Colo. Date 10/-22/18.

Diagnosis: TUBERCULOSIS CHRONIC PULMONARY.

Origin is in the line of duty. Disability not result of own misconduct.

6/25/18—Tuberculosis, chronic, pulmonary. Origin. Line of duty. Patient complains of cough, which is persistent and productive; occasional night sweats, loss of weight (10# in last 2 months) and strength. Physical exam. shows moderate dullness at right apex with breathing which is almost bronchial in character, increased whispered voice and tactile fremitus. 6/26/18—To U. S. Naval Hospital, New London, Conn., for further disposition and treatment. 6/26/18—Naval Hos-

pital, New London, Conn. Diagnosis—Tuberculosis, chronic, pulmonary. Origin—Line of duty, not due to his own misconduct. For past month patient has had persistent cough. Has raised considerable blood stained sputum. Some loss of weight, drenching night sweats. Physical exam. To left of sternum in ¾th interspace moderate dullness with bronchial breathing, slight dullness in both apices. Heart normal. X-Ray of chest shows peri-bronchial thickening at hilum of right lung. Sputum negative. 6/28/18—Sputum negative. Appetite poor. Cough persistent. 7/2/18—Slight hemoptysis this A. M. Sputum negative. 7/8/18—No change since admission. Sputum negative. 7/11/18—Given 4 days leave. 7/17/18—No change in condition. Complains of general malaise and occasional night sweats. 7/22/18—Patient low in spirit. 7/25/18—Heart enlarged to left about one cm. Murmur at apex. Systolic in time. 8/1/18—Temp. chart kept for ten days shows no subnormal temp. in A. M. or evening rise. Separate dishes. Condition improved. 8/10/18—Improving in general health. 8/19/18—Slight improvement relative but general condition not such improved. Referred to Board of Survey. 8/21/18—No change in physical exam. since admission. On left side there is a gland about the size of a chestnut—consistency soft, evidently suppurating. Refused to have it incised. Incised later, however. 8/25/18—Board of Medical Survey confirms findings above, finds him unfit for service and recommends his transfer to U. S. Naval Hospital, Fort Lyon, Colo.

8/27/18—On approved recommendation Board of Medical Survey, transferred to U. S. Naval Hospital at Fort Lyon, Colo. 8/31/18—Tuberculosis, chronic, pulmonary, Line of duty. Feels good. Eats good. Sleeps poor compared with last exam. Temp. 99°. Pulse 88. Cough—some. Weight 144. Pain—Slight anterior part of chest. Sputum—none. TB. Bacilli—neg. Leucocytes 10460. Bowels—regular. Exam. shows a moderately well nourished male with fair expansion (much less over upper lobes). Right lung shows slightly impaired resonance over apex with increased whisper voice over apex, and also over bronchial root. Few dry rales over bronchial root. Left lung shows impaired [67] resonance to 3d rib with increased broncho-vesicular breathing. No rales. Heart-apex just inside nipple line, no murmurs. Throat negative. On right side of neck is small mass evidently wen. X-Ray: Right lung shows light infiltration of upper lobe and bronchial root. Left lung shows light infiltration of upper part of upper lobe and to some extent of the bronchial root. Heart negative. 10/2/18—Admitted to M. W. of A. san, Woodmen, Colo. 10/22/18—Discharged on order from Fort Lyons. 10/22/18—Discharged: Approved recommendation Board of Medical Survey.

Disabilities noted at enlistment: Defective teeth. Very large inguinal rings. Lowered arches.

ROY AIKMOR,
Chief Pharmacist, U. S. A.

E. R. STITT.

Mr. MOLUMBY.—Exhibit 3 is his application for Government insurance:

PLAINTIFF'S EXHIBIT III.

UNITED STATES OF AMERICA,

UNITED STATES VETERANS' BUREAU.

March 16, 1922.

PURSUANT to Section 882 of the Revised Statutes, I hereby certify that the annexed photostatic copy of Application For Insurance signed Herbert H. McGovern, Jr., dated March 5, 1918, Insurance No. 1 941 583, is a true copy of the original on file in this Bureau.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the United States Veterans' Bureau to be affixed, on the day and year first above written.

[Seal] C. R. FORBES,

Director of The United States Veterans' Bureau.

APPLICATION FOR INSURANCE.

1941583 010575

My full name is Herbert Hugh McGovern, Jr.

Home Address—Oak Grove, Oregon.

Date of birth—February 22, 1893. Age—25. [68]

Date of last enlistment or entry into active service —Sept. 5th, 1917.

I hereby apply for insurance in the sum of $10,000 payable as provided in the Act of Congress approved October 6, 1917, to myself during permanent total disability and from and after my death to the following persons in the following amounts:

Relationship to me	Name of Beneficiary (Given) (Middle) (Last Name)	Postoffice Address	Amount of Insurance for Each Beneficiary
Father	Herbert Hugh McGovern, Sr.	Oak Grove, Oregon	$10,000

In case any beneficiary die or become disqualified after becoming entitled to an installment but before receiving all installments, the remaining installments are to be paid to such person or persons within the permitted class of beneficiaries as may be designated in my last will and testament, or in the absence of such will, as would under the laws of my place of residence be entitled to my personal property in case of intestacy.

I authorize the necessary monthly deduction from my pay, or if insufficient, from any deposit with the United States, in payment of the premiums as they become due, unless they be otherwise paid.

If this application is for less than $5,500 insurance, I offer it and it is to be deemed made as of the date of signature.

If this application is for less than $4,500 insurance and in favor of wife, child, or widowed mother, I offer it and it is to be deemed made as of February 12, 1918.

If this application is for less than $4,500 and in favor of some person or persons other than wife, child, or widowed mother, I offer it and it is to be deemed made as of (Date of signature—February 12, 1918). Strike out whichever is not wanted.

NOTE.—If in the last paragraph you strike out "Date of signature," leaving "February 12, 1918,"

the law gives you $25 a month for life in case of permanent total disablement occurring prior to such date and the same monthly amount to your widow, child, or widowed mother for not to exceed 240 months less payments made to you while living, but nothing to anyone else in case of your death before such date, and the insurance for the designated beneficiary other than wife, child, or widowed mother is effective only if you die on or after February 12, 1918.

If you strike out "February 12, 1918," leaving "Date of signature," a smaller insurance both against death and disability takes effect at once, but is payable in case of death to the designated beneficiary.

To whom do you wish policy sent?

(Name) HERBERT H. McGOVERN,
(Address) Oak Grove, Oregon.

Sign here: HERBERT H. McGOVERN, Jr.
M. M. 1st Cl. U. S. N. R. F.

Signed at (on board) A. S. S. C. 42 the 5th day of March, 1918. Witnessed by: J. E. CARTER. Rank—Ensign. Commanding A. S. S. C. 42. [69]

MONTHLY PREMIUMS FOR EACH $1,000 OF INSURANCE.

(Each $1,000 of insurance is payable in installments of $5.75 per month of 240 months; but if the insured is totally and permanently disabled and lives longer than 240 months the payments will be continued as long as he lives and is so disabled.)

Age	Monthly premium	Age	Monthly premium
15	$0.63	40	$0.81
16	.63	41	.82
17	.63	42	.84
18	.64	43	.87
19	.64	44	.89
20	.64	45	.92
21	.65	46	.95
22	.65	47	.99
23	.65	48	1.03
24	.66	49	1.08
25	.66	50	1.14
26	.67	51	1.20
27	.67	52	1.27
28	.68	53	1.35
29	.69	54	1.44
30	.69	55	1.53
31	.70	56	1.64
32	.71	57	1.76
33	.72	58	1.90
34	.73	59	2.05
35	.74	60	2.21
36	.75	61	2.40
37	.76	62	2.60
38	.77	63	2.82
39	.79	64	3.07
		65	3.35

Insurance may be applied for in favor of one or more of the following persons with sum of $500 or a multiple thereof for each beneficiary, the aggre-

gate not exceeding the limit of $10,000 and not less than $1,000 upon any one life:

Husband or wife.

Child, including legitimate child; child legally adopted before April 6, 1917, or more than six months before enlistment or entrance into or employment in active service, whichever date is the later; stepchild, if a member of the insured's household; illegitimate child, but if the insured is his father, only if acknowledged by the instrument in writing signed by him, or if he has been judicially ordered or decreed to contribute to such child's support, and if such child, if born after December 31, 1917, shall have been born in the United States or in its insular possessions.

Grandchild, meaning a child, as above defined, of a child as above defined.

Parent, including father, mother, grandfather, grandmother, stepfather, and stepmother, either of the insured or his/her spouse.

Brother or sister, including of the half blood as well as of the whole blood, stepbrothers and stepsisters and brothers and sisters through adoption.

Mar. 20, 1918.

Recorded by me this date. Checkage of premium ($6.60) will be made by me monthly from date of this application. First Checkage made Mar. 5, 1918, for $6.60.

C. W. LITTLEFIELD,
Pay Director, U. S. N. Rtd. [70]

Mr. MOLUMBY.—Exhibit 4 is his application for compensation because of his disability, with the accompanying physician's report and affidavit:

PLAINTIFF'S EXHIBIT IV.

UNITED STATES OF AMERICA,
UNITED STATES VETERANS' BUREAU.

March 23, 1922.

PURSUANT to Section 882 of the Revised Statutes, I hereby certify that the annexed photostatic copies of Form 526, Application of Person Disabled in and Discharged from Service, signed Herbert Hugh McGovern, Jr., dated Sept. 1, 1919; Employment Statement signed Herbert H. McGovern, Jr., dated May 1, 1919; Physician's Report, Form 504; and Form 526, Application of Person Disabled in and Discharged from Service, signed Herbert Hugh McGovern, Jr., dated April 16, 1919, are true copies of the originals on file in this Bureau.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the United States Veterans' Bureau to be affixed, on the day and year first above written.

[Seal] C. R. FORBES,
Director of the United States Veterans' Bureau.

APPLICATION OF PERSON DISABLED IN AND DISCHARGED FROM SERVICE.
READ WITH GREAT CARE.

You must furnish the information called for in this application, and support your answers with proof called for in these instructions, as part of your claim under the act of Congress of October

6, 1917. Every question herein must be answered fully and clearly. Answers and affidavits should be written in clear, readable hand, or typewritten, and if you do not know the answer to a question, say so.

1. Forward with this application a certified copy of your certificate of discharge from the service. If at the time of your discharge or resignation you obtained from the Director of the Bureau of War Risk Insurance a certificate that you were then suffering from injury likely to result in death or disability, the original or a certified copy of such certificate of disability should be forwarded with this application as part of your claim. [71]

2. You should also inclose a report by your attending or examining physician. If you are receiving treatment in any hospital, sanitarium, or similar institution, you may submit the hospital report or record of your case, showing your physical condition, the origin, nature and extent of your disability, and the probable duration of such disability.

3. If you have a wife or children, the fact that your wife and children are living must be shown by the affidavits of two persons, who should also state whether you and your wife and children are living together or apart, and whether or not you are divorced.

4. Your marriage must be proven by a certified copy of the public or church record, or if this is not obtainable, by the affidavit of the clergyman or magistrate who officiated, or by the affidavits of

two eye-witnesses to the ceremony, or of two persons who have personal knowledge of your marriage. If either party was divorced from a former wife or husband, that fact should be shown by a verified copy of the court order or decree of divorce.

5. Ages of children must be shown by a certified copy of the public record of birth, or the church record of baptism, or if these are not obtainable, by the affidavits of two persons, giving the name of the child, the date and place of birth, and the names of both parents.

6. If claim is made on account of a stepchild, it must be shown by the affidavits of two persons whether such child is a member of the claimant's household, and if claim is made for an adopted child a certified copy of the court letters or decree of adoption must be submitted.

7. If additional compensation is claimed for a dependent parent, relationship to such parent must be shown by a certified copy of the public record of the claimant's birth, or the church record of his baptism, or, if such evidence can not be obtained, by the affidavits of two persons. Whether or not the dependent parent for whom compensation is claimed is a widow or widower should be shown by the affidavits of two persons, who must state the specific amount of annual income from each separate source, the location and value of all property, real and personal, owned by said dependent, his or her physical condition, employment and earnings, and the amount of the disabled person's average monthly contribution to the support of the de-

pendent parent. The parent claimed for should be one of the persons to make affidavit to these facts if mentally competent.

8. The affidavits of two persons required in support of your claim should be made on the blank form on the last page of this application.

All papers which you sent this bureau must bear your full name, former rank, and organization. The number C—— must also appear upon each paper.

_____,

Commissioner. [72]

PENALTY.

That whoever in any claim for family allowance, compensation, or insurance, or in any document required by this act, or by regulation made under this act, makes any statement of a material fact, knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both.

1. Full name—Herbert Hugh McGovern, Jr.
2. Address—Roseberry, Idaho.
3. Under what name did you serve? Same as above. (a) Serial No. C193312.
4. Color—White. Date of Birth—Feby. 22, 1893. Place of Birth—Shurben, Minn.
5. Make a cross (X) after branches of service you served in: General Service ——. Limited Service ——. Army ——. Navy X. Marine Corps ——. Coast Guard ——.

6. Date you last entered service—June 19, 1917. Place of entry—Puget Sound N. Yard.
7. Rank or rating at time of discharge—Machinist Mate first class U. S. N. R. F.
8. Company and regiment or organization, vessel, or station in which or on which you last served—S. C. 42.

8a. State fully any other service in the military or naval forces of the United States—None.

9. Date and place of last discharge—Fort Lyons, Colo.
10. Cause of discharge—Disability incurred in line of duty.
11. Nature and extent of disability claimed—Unable to hold position.
12. Date disability began—About May, 1918.
13. Cause of disability—Foul Eng. room gas and salt water. Storage Batteries forming chloride gas.
14. When and where received—Off Coast Conn.
15. Occupations and wages before entering serice—Mining Engr. $100.00 per Mo. & Expenses.
16. Last two employers—Do not remember.
17. Occupations since discharge, dates of each, and wages received; if less than before service, why—Unable to perform any kind of services.
18. Present employer—Not employed. [73]
19. Name and address of doctor or hospital treating you—St. Luke's Hospital, Kansas City, Mo.

20. Are you confined to bed? No. Do you require constant nursing or attendance? No.
21. Name and address of nurse or attendant—Not regularly.
22. Are you willing to accept medical or surgical treatment if furnished? No.
23. Are you single, married, widowed, or divorced? Single.
24. Times married ——.
25. Date and place of last marriage ——.
26. Times present wife has been married ——.
27. Maiden name of wife.
28. Do you live together? ——.
29. Have you now living a child or children, including stepchildren and adopted children, under eighteen years of age and unmarried? No.
30. If so, state below full name of each child, and date of birth; if a stepchild or adopted child, so state, and give date child was adopted by you or became a member of your household.

Name of child.	Date of Birth			Name and address of person with whom child lives.
	Day.	Month.	Year.	
None				

31. Have you a child of any age who is insane, idiotic, or otherwise permanently helpless? No.
32. State whether your parents are living together, separated, divorced, or dead—Mother dead.
33. Give name and address of each parent living—Father, Marion, Mont.

34. Age of mother—At death about 37. Age of father—About 55.
35. (a) Is your mother now dependent upon you for support? No.
    (b) Is your father now dependent upon you for support? No, not at present.
    (c) If so, your average monthly contribution to your mother—$——. Your father ——.
36. (a) Value of all property owned by your mother—$——. Your father—Not known.
    (b) What is the annual income of your mother—$—— Your father—Not known. [74]
37. Did you make an allotment of your pay? Yes.
38. If so, to whom? To Father. Amount—$15.00.
39. Give number of any other claim filed in account of this disability, and place filed. This is only one that has had attention.
40. Did you apply for War Risk Insurance? Yes.
41. When and where? Navy Yard, New York.
42. Insurance certificate number—Can't say. Cert. not here.
43. Name of beneficiary—Herbert Hugh McGovern.

I make the foregoing statements as a part of my claim with full knowledge of the penalty provided for making a false statement as to a material fact in a claim for compensation or insurance.

HERBERT HUGH McGOVERN, Jr.

Subscribed and sworn to before me this 1st day

of Sept., 1919, by Herbert Hugh McGovern, Jr., claimant, to whom the statements herein were fully made known and explained.

ROBERT E. HAYNES,
Notary Public.

C193312.

EMPLOYMENT STATEMENT.

May 1, 1919.

State of Oregon,
County of Multnomah,—ss.

1. State your occupation and your average monthly earnings during the twelve months prior to entering the service. Mining Eng. $100.
2. State the exact date on which you first returned to work after discharge from the service and the monthly wages or earnings received. Unable to work.
3. State the name and address of your first employer after your discharge from the service. No employer.
4. Have you stopped working in the place named above? (a) If so give the date and the reason you stopped working:
5. State the name of your present employer, the date you started working for him and your monthly wages:
6. State fully every other position and employment you have had since your [75] discharge from the service, stating date you went to work, date you stopped and monthly wages received:

7. Are you disabled for your former employment by any injury or disease received in the service: Yes. (a) If so state just how: Loss of strength and nervousness.

I hereby certify to the truth of the foregoing statements.

Dated: May 12, 1919.

Signature—HERBERT H. McGOVERN, Jr.

Address—253 E.-39th St., Portland, Ore.

Sec. 25. That whoever in any claim for family allowance, compensation or insurance or in any document required by this Act or by regulation made under this Act, makes any statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years or both. C. C. Form 539.

PHYSICIAN'S REPORT.

This blank should be filled out in ink, using pen or typewriter. Every question should be answered as fully and clearly as possible and the report should be mailed at once to the Compensation Section, Bureau of War Risk Insurance, Washington, D. C. See penalty below.

1. Name of man: H. H. McGovern.
2. His alleged rank and organization in the service: Machinist Mate 1st Class U. S. E. R. F.
3. Home address: 253 39th St., Portland, Ore.
4. Date first examined or treated by you: April 10th/19. (A) Treatment rendered: None.
5. Physical condition at that time: As a result of gas in submarine chaser was taken sick

June 10th/18—& sent to Base Hospital, New London, Conn.; (2 mos.) & then Fort Lyons, Colo. Naval Sanitarium (1 mo.) & later at Woodman Sanitarium, Woodman, Colo. (1 mo.) & treated for Chronic Pulmonary.

6. Physical condition at present: Tuberculosis. Complains of slight cough—Very little sputum and great feeling of weakness. The signs of *tubercu.*
7. Origin, nature and extent of injury or disease so far as determinable: *losis* have been revealed—but at no time have the germs been discovered. [76]
8. Do you consider that the injury or disease from which he is suffering was received in the service, or was seriously increased or accelarated to a disabling extent by the conditions and exposure incident to service? Yes.
9. State extent of his present disability: Permanent and total—Temporary total —— Partial —— Per cent of total —— Is totally disabled.
10. Is he able to perform any part of former or any other occupation? At present time no. If so, what? ——.
11. Has he a specific injury of a permanent nature? Yes. If so, describe fully. ——.
12. Do you recommend operation? No. Institutional care? Yes.
13. What are chances for arrest of recovery? Uncertain.

14. For what period from the date of discharge (not from the date of first disability and not from the date of this report) is disability likely to exist? A. From the surgical viewpoint?——. B. From vocational viewpoint? Unknown.
15. Is his condition yielding to treatment? No.
16. Remarks ——.

(Signed by physician, whose signature is illegible.)
Graduate of ——. Year ——.

IMPORTANT.

"Sec. 25. That whoever in any claim for family allowance, compensation, or insurance, or in any document required by this Act or by regulation made under this Act, makes statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than $5,000 or by imprisonment for not more than two years or both."

APPLICATION FOR PERSON DISABLED IN THE SERVICE.

READ WITH GREAT CARE.

You must furnish the information called for in this application, and support your answers with proof called for in these instructions, as part of your claim under the act of Congress of October 6, 1917. Every question herein must be answered fully and clearly. Answers and affidavits should be written in clear, readable hand, or typewritten, and if you do not know the answer to a question, say so.

1. Kindly forward with the application your certificate of discharge from the service. A copy will be made at this office and the original will be returned to you. If at the time of your discharge or resignation you [77] obtained from the Director of the Bureau of War Risk Insurance a certificate that you were then suffering from injury likely to result in death or disability, the original or a certified copy of such certificate of disability should be forwarded with this application as part of your claim.

2. You should also inclose a report by your attending or examining physician on the inclosed physician's report blank. If you are receiving treatment in any hospital, sanitarium, or similar institution, you may submit the hospital report or record of your case, showing your physical condition, the origin, nature, and extent of your disability, and the probable duration of such disability.

3. If you have a wife or children, the fact that your wife and children are living must be shown by the affidavits of two persons, who should also state whether you and your wife and children are living together or apart, and whether or not you are divorced.

4. Your marriage must be proven by a certified copy of the public or church record, or if this is not obtainable, by the affidavit of the clergyman or magistrate who officiated, or by the affidavits of two eye-witnesses to the ceremony, or of two persons who have personal knowledge of your marriage. If either party was divorced from a former wife or

husband, that fact should be shown by a verified copy of the court order or decree of divorce.

5. Ages of children must be shown by a certified copy of the public record of birth, or the church record of baptism, or if these are not obtainable, by the affidavits of two persons, giving the name of the child, the date and place of birth, and the names of both parents.

6. If claim is made on account of a stepchild, it must be shown by the affidavits of two persons whether such child is a member of the claimant's household, and if claim is made for an adopted child a certified copy of the court letters or decree of adoption must be submitted.

7. If additional compensation is claimed for a dependent parent, relationship to such parent must be shown by a certified copy of the public record of the claimant's birth, or the church record of his baptism, or if such evidence cannot be obtained by the affidavits of two persons. Whether or not the dependent parent for whom compensation is claimed is a widow or widower should be shown by the affidavits of two persons, who must also state the amount of such parent's annual income from all sources, and the specific amount of income from each separate source, the location and value of all property, real and personal, owned by said dependent, or his or her physical condition, employment and earnings, and the amount of the disabled person's average monthly contribution to the support of the dependent parent. The parent claimed for should be one of the persons to make affidavit to these facts if mentally competent.

8. The affidavits of two persons required in support of your claim should be made on the blank form on the last page of this application.

All papers which you send this bureau must bear your full name, rank and organization. The number —— must also appear upon each paper.

_____,

Deputy Commissioner. [78]

PENALTY.

Sec. 25. That whoever in any claim for family allowance, compensation, or insurance, or in any document required by this act, or by regulation made under this act, makes any statement of a material fact, knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both.

1. Full name: Herbert Hugh McGovern, Jr.
2. Address: 253 E. 39th St. Portland, Oregon.
3. Under what name did you serve? Herbert Hugh McGovern, Jr.
4. Color: White. Date of Birth: Feb. 22, 1893. Place of birth: Shurben, Minn.
5. Make a cross (X) after branches of service you served in: Army ——. Navy X. Marine Corps ——. Coast Guard ——.
6 Date you last entered service ——. Place of entry ——.
7. Rank or rating at time of discharge: Machinist mate first class.
8. Company and regiment or organization, vessel,

or station in which or on which you last served: S. C. 42.

8a. State fully any other service in the military or naval forces of the United States: None.

9. Date and place of last discharge: Oct. 17, 1918.

10. Cause of discharge: Physical disability incurred in line of duty.

11. Nature and extent of disability claimed: Total disability.

12. Date disability began: About June 17th, 1918.

13. Cause of disability: Salt water getting in storage batteries & Eng. room gas.

14. When and where received: While on duty S. C. 42.

15. Occupations and wages before entering service: Mining.

16. Last two employers: Worked for myself.

17. Occupations since discharge, dates of each, and wages received; if less than before service, why? None. Strength gone, frequent sickness.

18. Present employer: None.

19. Name and address of doctor or hospital treating you: None at present.

20. Are you confined to bed? No. Do you require constant nursing or attendance? No.

21. Name and address of nurse or attendant: None. [79]

22. Are you willing to accept medical or surgical treatment if furnished? No.

23. Are you single, married, widowed, or divorced? Single.
24. Times married: None.
25. Date and place of last marriage: None.
26. Times present wife has been married: None.
27. Maiden name of wife:——
28. Do you live together? ——
29. Have you now living a child or children, including stepchildren and adopted children, under eighteen years of age and unmarried? None.
30. If so, state below full name of each child, and date of birth; if a stepchild or adopted child, so state, and give date child was adopted by you or became a member of your household.
31. Have you a child of any age who is insane, idiotic, or otherwise permanently helpless?
32. State whether your parents are living together, separated, divorced, or dead: Mother dead.
33. Give name and address of each parent living: H. H. McGovern, Sr., 253 E. 39th St., Portland, Oregon.
34. Age of each parent: Father 54. Mother dead.
35. Extent either is actually dependent on you for support: Father was dependent (partial) but not dependent at present.
36. To whom did you make an allotment of your pay? Father, H. H. McGovern, Sr.
37. Amount of Allotment: $15.
38. Give number of any other claim filed on account of this disability, and place filed: None.

39. Did you apply for War Risk Insurance? Yes.
40. When and where? Aboard S. C. 42, Brooklyn Navy Yard, N. Y.
41. Insurance certificate number # 5232.
42. Name of beneficiary: H. H. McGovern, Sr.

I make the foregoing statements as a part of my claim with full knowledge of the penalty provided for making a false statement as to a material fact in a claim for compensation or insurance.

HERBERT HUGH McGOVERN, Jr.

Subscribed and sworn to before me this 16th day of April, 1919, by Herbert Hugh McGovern, claimant, to whom the statements herein were fully made known and explained.

MARTIN W. HAWKINS,
Notary Public for Ore.

My com. exp. Oct. 18, 1920. [80]

We, the undersigned, hereby certify that we are well acquainted with Herbert Hugh McGovern, claimant, whose name was subscribed hereto in our presence, and that we know him to be the person —— herein.

MARTIN W. HAWKINS,
Portland, Ore.
MRS. J. G. GALLINGHAM,
Portland, Oregon.

Mr. MOLUMBY.—Exhibit 5 is a certified copy of the regulations passed by the Bureau of War Risk Insurance and the Director of the Veterans' Bureau. Exhibit 6 is what is termed a Brief Face, a term of the Veterans' Bureau indicating the different amounts of compensation that have been paid to him, and the different ratings that he has had:

PLAINTIFF'S EXHIBIT VI.

UNITED STATES OF AMERICA.

UNITED STATES VETERANS' BUREAU.

March 20, 1922.

PURSUANT to Section 882 of the Revised Statutes, I hereby certify that the annexed photostatic copies of Compensation Disability Brief Face of Herbert Hugh McGovern, Jr., and supplemental Compensation Disability Brief Face, are true copies of the originals on file in this Bureau.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the United States Veterans' Bureau to be affixed, on the day and year first above written.

C. R. FORBES,
Director of the United States Veterans' Bureau.

TREASURY DEPARTMENT.

BUREAU OF WAR RISK INSURANCE.

COMPENSATION DISABILITY BRIEF FACE.

Herbert Hugh McGovern, Jr. Mach. Mate 1/C
U. S. N.
(Name of person disabled.) (Rank and organization.)

Date of (Discharge.) Oct. 17, 1918.
(~~Resignation~~) [81]

(Award Temp. total.

Degree and per cent of disability (1st Sub.

(2d Sub.

Cause of disability: Disease.

Date of disability: June 17, 1918.

	Monthly payment	Commencing date.	Ending date.
Payee No. 1—Herbert Hugh McGovern, Jr.	$30.00	Oct. 18–18	
Address—253 E. 39th St., Portland, Org.			

Award to payee(s) No. One—submitted Sept. 4, 1919 John S. Phelan Examiner

Award to payee(s) No. approved 9/2/1919 F. A. Emminger Reviewer

TREASURY DEPARTMENT.

BUREAU OF WAR RISK INSURANCE.

COMPENSATION DISABILITY BRIEF FACE.

Herbert Hugh McGovern, Jr.

Mach. Mate 1/c U. S. N.

(Name of person disabled.) (Rank and organization.)

Date of (Discharge) Oct. 17, 1918.

(~~Resignation~~.)

(Award. T. T.

Degree and per cent of disability (1st. Sub.

(2d. Sub.

Cause of disability Disease.

Date of disability June 17, 1918.

	Monthly payment	Commencing date	Ending date
Payee No. 1—Mr. Herbert Hugh McGovern, Jr.	$30.00	10/18/18	5/31/20–
Address— 253 E. 39th St., Portland, Ore.			10/18/18
Payee No. 1—Amended Same	12.00	6/ 1/20	11/30/20–
Address— Same			6/1/20–
Payee No. 1—	80.00	12/ 1/20	12/1/20
Address— Loy J. Molumby	80	10/18/18	5/31/20
Payee No. 4—legal guard of Herbert	12	6/ 1/20	11/30/20
Address— Hugh McGovern, Jr.	80	12/ 1/20	12/31/21
Payee No. 5—414 Ford Bldg., Great Falls, Mont.			
[82]			
Payee No. 6—Amended award	8	1/ 1/22	
Address—			

Award to Payee(s) No.	1	submitted	9/ 4/1919	Phelan	Examiner
Award to Payee(s) No.	1	approved	9/ 6/1919	Emminger	Reviewer
Ending date to payee(s) No.					Reviewer
Sub. award to payee(s) No.	1	submitted	6/18/1920	B. S. Nolan	Examiner
Sub. award to payee(s) No.	1	approved	6/19/1920	A. Simkins	Reviewer
Ending date to payee(s) No.					
Second Sub. award to payee(s) No.	1	submitted	2/16/21	J. Donohue	Examiner
Second Sub. award to payee(s) No.	1	approved	2/17/21	Cloggins	Reviewer
	1	sub.	3/29/21	N. Efran	
	1	app.	4/ 2/21	Cloggins	
	1	sub.	11/15/21	F. C. Dowell	Examiner
	1	app.	11/17/21	C. W. Mason	

Mr. MOLUMBY.—Exhibit 7 are photostatic copies of the ratings which have been given to him by the United States Veterans' Bureau, different ratings of his disability from the date of his discharge until the last one, I believe is dated December, 1921.

PLAINTIFF'S EXHIBIT VII.

UNITED STATES OF AMERICA.

UNITED STATES VETERANS' BUREAU.

March 17, 1922.

PURSUANT to Section 882 of the Revised Statutes, I hereby certify that the annexed photostatic copies of Rating Sheet dated Dec. 6, 1921, signed T. Foster; Rating Sheet dated Nov. 9, 1921, signed W. E. Chambey; Memorandum dated Oct. 5, 1921, signed R. A. Thornley; Rating Sheet dated Oct. 4, 1921, signed T. Foster; Rating Sheet dated Sept. 9, 1921, signed J. E. Cashin; Memorandum dated January 5, 1921, signed Haven Emerson; Memorandum dated Dec. 17, 1920, signed Haven Emerson; Memorandum dated Nov. 3, 1920, signed L. B. Rogers; Memorandum dated Oct. 30, 1920, signed L. B. Rogers; Memorandum dated June 14, 1920, signed W. C. Rucker; Memorandum dated June 10, 1920, signed W. C. Rucker; Memorandum dated June 8, 1920, signed W. C. Rucker; Memorandum dated April 9, 1920, signed W. C. Rucker; Memorandum dated Oct. 20, 1919, signed W. C. Rucker; and Memorandum dated August 21, 1919, signed W. C. Rucker, are true copies of the originals on file in this Bureau. [83]

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the United States Veterans' Bureau to be affixed, on the day and year first above written.

[Seal] C. R. FORBES,

Director of the United States Veterans' Bureau.

UNITED STATES VETERANS' BUREAU.
MEDICAL DIVISION.
RATING SHEET.

Date—Dec. 6, 1921.

From Medical Division to Claims Division. M. B. of Review—TF/df:10.

Through: Board of Appeals.

Claimant's name: Herbert P. McGovern. C—193-312 N.

Address: Kalispell, Mont. Box 396.

Based upon all the evidence in the file at the present time, it is my opinion that the disability of the claimant mentioned above should be rated as:

T. B.: Temporary Total from date of discharge to Oct. 30, 1920.
Less than ten per cent from Oct. 30, 1920.
Alleged T. B.—Service connected.

N. P.: Less than ten per cent from date of discharge to May 3, 1920.
Temporary Total from May 3, 1920, to May 13, 1920.
Temporary Partial ten per cent (10%) from May 13, 1920, to Oct. 30, 1920.
Temporary Total from Oct. 31, 1920, to May 15, 1921.
Temporary Partial fifty per cent (50%) from May 15, 1921.
Held as service connected under Section 18, Public 47, 67th Congress.
(Practically continuous hospitaliza-

tion for Constitutional Psychopatic Inferiority with a superimposed emotional instability and paranoid trend.)

COMBINED: Temporary Total from date of discharge to May 15, 1921.

Temporary Partial fifty per cent (50%) from May 15, 1921.

Constitutional Psychopatic Inferiority with superimposed emotional instability and paranoid trend and Tuberculosis chronic apparently arrested.

By T. FOSTER, M. D.,
Chairman, Board of Review.

ROBERT U. PATTERSON,
Asst. Director, in Chg. Med. Div.

APPROVED: Reg. 4 A–I–C. Feb. 1, 1922.

S. ———— (name illegible).
H. E. CHASE,
Board of Appeals. [84]

VETERANS' BUREAU.

MEDICAL DIVISION.
RATING SHEET.

Date—Nov. 9, 1921.
WEC/mg 10.

From Medical Division to Claims Division.
Through: Special Service Section.
Claimant's name: Herbert H. McGovern.
Address: Box 396, Kalispell, Montana.

Based upon all the evidence in the file at the

present time, it is my opinion that the disability of the claimant mentioned above should be rated as:

TB: No pulmonary disability established. (Chronic Bronchitis, suspected Tuberculosis.) JG.

NP: Less than ten per cent from date of separation from active service (10/17/18) to 5/3/20. Temporary total from 5/3/20 to 5/13/20. Temporary partial ten per cent (10%) from 5/13/20 to 12/9/20. Temporary total from 12/9/20 to 5/14/21. Temporary partial ten per cent (10%) from 5/14/21.

Held as acquired in service or aggravated by service in accordance with provisions of Section 18, Public No. 47.

(Constitutional Psychopathic inferiority with superimposed psychoneurosis.) JM.

Exam. 1/2/22.

ROBERT U. PATTERSON,
Assistant Director, in Charge of Medical Division.
By W. E. CHAMBEY, M. D.,
Chief SMS.

TREASURY DEPARTMENT.

BUREAU OF WAR RISK INSURANCE.

MEMORANDUM. Date—October 5, 1921.

From: Neuro-Psychiatric Branch.

To: Dr. D. O. Smith.

Subject: Herbert Hugh McGovern. C—193,312.

I am returning case to you as requested.

The N. P. rating is as follows:

Temporary partial less than 10% from date of

separation from active service, October 17, 1918, to May 3, 1920; total temporary from May 3, 1920, to May 13, 1920; temporary partial 10% from May 13, 1920, to December 9, 1920; total temporary from December 9, 1920, to May 14, 1921; temporary partial 10% from May 14, 1921; Constitutional Psychopathic Inferiority with superimposed emotional Instability and paranoid trend.

Held as acquired in service or aggravated by service in accordance with provisions of Section 18, Public No. 47.

RAT. td:10.

R. A. THORNLEY,
Chief N. P. Branch. [85]

RATING SHEET.

Date—October 4, 1921.

DOS–mf–10–Medical Board of Review.

From Medical Division to Compensation and Claims Division.

Through: Board of Appeals.

Claimant's name: Herbert McGovern.

Address: Kalispell, Montana. C—193,312.

Based upon all the evidence in the file at the present time, it is my opinion that the disability of the claimant mentioned above should be rated as:

NOT Permanent Total under Reg. 4, B. IV, (b).

Temporary Total from date of discharge to September 2, 1920;

50% Temporary Partial from September 3, 1920, to November 12, 1920;

Temporary Total from November 13, 1920, during hospitalization, to May 15, 1921;

50% Temporary Partial from May 16, 1921.

Chronic Bronchitis; alleged pulmonary tuberculosis, (not shown to exist); constitutional psychopathic inferiority. Service connected. Competent.

T. FOSTER,
Chairman.

APPROVED: Oct. 5, 1921.

S ———— (name illegible).
H. E. CHASE,
Board of Appeals.

RATING SHEET.

Date—September 9, 1921.
JEC/ew:10–T. B.

From Medical Division to Compensation and Claims Division.

Through:

Claimant's name: Herbert H. McGovern.

Address: Kalispell, Montana. C—193,312.

Based upon all the evidence in the file at the present time, it is my opinion that the disability of the claimant mentioned above should be rated as:

N. P.: Disability not connected with the service. This case does not fall under provisions of Section 18, Public No. 47. There is no N. P. disability as provided in that Section, within two years from date of discharge. (Constitutional Psychopathic Inferiority without Psychosis). [86]

T. B.: Temporary Total from discharge to Oct. 29, 1920.

Less than ten per cent disabled from October 30, 1920.

Service connected. (Pulmonary Tuberculosis).

ROBERT U. PATTERSON,
Medical Adviser.
By J. E. CASHIN, M. D.

TREASURY DEPARTMENT.
BUREAU OF WAR RISK INSURANCE.
MEDICAL DIVISION.

Date—Jan. 5, 1921.
ELR/el–10 Unit 8.

MEMORANDUM.

From: Medical Division.
To: Compensation and Insurance Claims Division.
Subject: Herbert H. McGovern. C—193,312.
Mach. Mate 1/C S. C. 42 U. S. N. R. F.

From the medical evidence presented in the file, it is my opinion that the disability of the claimant mentioned above should be rated as:

"Based on all the evidence in the file, the Surgical Rating is as follows:" TEMPORARY TOTAL From November 28th, 1920. Contracted in Service. Claimant still in hospital.

HAVEN EMERSON,
Assistant Director in Charge of Medical Division.
By E. L. ROBERTSON.

TREASURY DEPARTMENT.
BUREAU OF WAR RISK INSURANCE.
MEDICAL DIVISION.

Date—Dec. 17, 1920.
ELR/EB: 10
Med. unit 8

MEMORANDUM.
From: Medical Division.
To: Compensation and Insurance Claims Division.
Subject: Herbert McGovern. C—193312. [87]

From the medical evidence presented in the file, it is my opinion that the disability of the claimant above mentioned should be rated as:

No disability.

HAVEN EMERSON,
Medical Advisor.
By E. L. ROBERTSON.

TREASURY DEPARTMENT.
BUREAU OF WAR RISK INSURANCE.
MEDICAL DIVISION.

Date—Nov. 3, 1920.
EKH/orn/ecc:10–NP. S.

MEMORANDUM.
From: Medical Division.
To: Compensation and Insurance Claims Division.
Subject: Herbert McGovern. C—193,312.

From the medical evidence presented in the file, it is my opinion that the disability of the claimant above mentioned should be rated as:

NP.: Less than 10% (no percent) due to service.

L. B. ROGERS,
Acting Chief Medical Advisor.
By EARL K. HOLT,
Assistant Medical Advisor.

TREASURY DEPARTMENT.
BUREAU OF WAR RISK INSURANCE.

Date—Oct. 30, 1920.

MEMORANDUM.
From: Medical Division.
To: C. & I. Claims Division.
Subject: Herbert H. McGovern. C—193,312.

T. B. disability less than ten per cent (10%) from Sept. 2, 1920.

L. B. ROGERS,
Acting Assistant Director, in Charge Medical Division.

J. GIRDWOOD.

JG/b/10. [88]

TREASURY DEPARTMENT.
BUREAU OF WAR RISK INSURANCE.
MEDICAL DIVISION.

Date—June 14, 1920.
GBH–eig–met–10.

MEMORANDUM.
From: Medical Division.
To: Compensation and Insurance Claims Division.
Subject: Herbert H. McGovern. C—193312.

From the medical evidence presented in the file, it is my opinion that the disability of the claimant mentioned above should be rated as:

From all medical evidence in file, the N. P. disability is: TEMPORARY TOTAL from May 3, 1920, to May 13, 1920. TEMPORARY PARTIAL 16% (fifteen) from May 13th. Mental condition not contracted in or aggravated by service.

W. C. RUCKER,
Chief Medical Advisor.
By G. B. HAMILTON,
Assistant Medical Advisor.

TREASURY DEPARTMENT.

BUREAU OF WAR RISK INSURANCE.

Date—June 10, 1920.

MEMORANDUM.

From: Medical Division. Tuberculosis Section.
To: Compensation & Insurance Claims Division.
Subject: Herbert H. McGovern. C—193312.
U. S. N. R.

From the medical evidence presented in the file, it is my opinion that the disability of the claimant mentioned above should be rated as:

Temporary Total continued.

W. C. RUCKER,
Chief Medical Advisor.
By G. E. MARCHANT,
Assistant Medical Advisor.

GEM/erm.
Med. Form 1750.
(Revised 4–7–20.) [89]

TREASURY DEPARTMENT.
BUREAU OF WAR RISK INSURANCE.

Date—June 8, 1920.
MC/ecc/10–ccc.

MEMORANDUM.
From: N–P Section.
To: T. B. Section.
Subject: Herbert McGovern, C—193312.

Referred on account of Tuberculosis.

N–P Temporary Total from May 3, 1920, to May 13, 1920, from May 13, 1920, Temporary Partial 15% (fifteen). Service connection not shown.

W. C. RUCKER,
Chief Medical Advisor.
Per M. COOLE.

TREASURY DEPARTMENT.
BUREAU OF WAR RISK INSURANCE.

Date—April 9, 1920

MEMORANDUM.
From: Medical Division. Tuberculosis Section.
To: Compensation and Insurance Claims Division.
Subject: Herbert H. McGovern. C—193312.
Mach. Mate 1/c.

From the medical evidence presented in the file and otherwise, it is my opinion that disability of the claimant mentioned above should be rated as: Temporary total confirmed and continued.

Monthly hospital report.

W. C. RUCKER,
Chief Medical Advisor.
By G. E. MARCHANT,
Assistant Medical Advisor.

GEM/ms 10.
Med. Form 1750.
(Revised 9–27–19.) [90]

TREASURY DEPARTMENT.
BUREAU OF WAR RISK INSURANCE.

Date Oct. 20, 1919.

MEMORANDUM.
From: Medical Division.
To: Compensation & Insurance Claims Division.
Subject: Herbert H. McGovern. C—193312.

From the medical evidence presented in the file and otherwise, it is my opinion that disability of the claimant mentioned above should be rated as: TEMPORARY TOTAL from date of discharged confirmed.

Re-examination in January.

W. C. RICKER,
Chief Medical Advisor.
By GROVER A. KEMPF,
Assistant Medical Advisor.
Per MRS.

MRS/wjm 10.
Med. Form 1750.
(Revised 9–27–19.)

TREASURY DEPARTMENT.
BUREAU OF WAR RISK INSURANCE.
Date—August 21st, 1919.

MEMORANDUM.

From: Medical Division.

To: Compensation & Insurance Claims Division.

Subject: Herbert H. McGovern, Jr. C—193312.

From the medical evidence presented in the file and otherwise, it is my opinion that the disability of the claimant mentioned above should be rated as: Temporary Total FROM DATE OF DISCHARGE.

Re-examination at once.

W. C. RUCKER,
Chief Medical Advisor.
By J. CLINTON FOLTZ,
Assistant Medical Advisor.

HCC:IR 10.

H. C. C.

Med. Form 1750. [91]

Mr. MOLUMBY.—Exhibit 8 is a photostatic copy of a medical report of Dr. A. W. Morrison and one of Dr. D. S. Babtkis and Dr. W. S. Broker and Dr. Julius Johnson:

PLAINTIFF'S EXHIBIT VIII.
UNITED STATES OF AMERICA.
UNITED STATES VETERANS' BUREAU.
March 20, 1922.

PURSUANT to Section 882 of the Revised Statutes, I hereby certify that the annexed photostatic copies of Medical Report signed A. W. Morrison, M. D., dated 11/12/21; Medical Report dated Nov.

8, 1921, signed D. S. Babtkis; Report dated Nov. 7, 1921, signed W. S. Broker; and Medical Report signed Julius Johnson, M. D., dated November 10, 1921, are true copies of the originals on file in this Bureau.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the United States Veterans' Bureau to be affixed on the day and year first above written.

[Seal] C. R. FORBES,
Director of the United States Veterans' Bureau.

THE NICOLLET CLINIC.
MINNEAPOLIS, MINN.

November twelfth, 1921.

DIVISION OF NEUROLOGY.
A. W. Morrison, M. D.

To: United States Veterans' Bureau,
Keith-Plaza Bldg.,
Minneapolis, Minn.

From: Dr. A. W. Morrison,
1009 Nicollet Avenue,
Minneapolis, Minn.

Subject: H. H. McGovern.

The above patient was sent to me for examination by Dr. J. C. Michael stating that the U. S. V. B. requested a neurological examination by someone other than one of their staff. [92]

Patient states that he is a mining engineer by profession. Always normal in his past life previous to enlisting in the Navy. Fond of athletics and enjoyed the things which other boys enjoy. He

was in the Navy for one year. Has no complaints to offer regarding treatment received while in service. He was on a submarine chaser in charge of the engine-room when considerable water was shipped which got into the sulphuric acid in the batteries and he inhaled the gas which closely resembled chlorine. This was in May, 1918. At this time he was extremely tired, having been on duty for about seventy hours, and he also states that he had a hemoptysis following the inhalation of the gas. He was admitted to the hospital promptly on account of chronic tuberculosis and he states now that it is again active.

His nerves began to bother him in June, 1918, when he fainted after becoming excited and angry. He still has these fainting spells which, he states, are brought on by excitement, too much confusion, or if he becomes too tired; that owing to his examinations here this time, he had two series of these attacks—one last night, and two the night before. He was alone both of these times but similar attacks have been observed while he was in U. S. P. H. S. Hospital #68. He says that during these attacks he has been absolutely unconscious, varying in length from five minutes to a whole day. He does not jerk during these attacks but states that he may jerk some in coming to, and that he feels somewhat groggy afterwards, also all tired out; that, following these attacks, he is particularly nervous and jumpy, and if anyone touches him, he goes "straight up in the air." As long as he remains in a quiet place he gets along moderately

well. He has been in many hospitals. He states there was a period during which he remembers nothing. He is absolutely unable to earn his own living and cannot possibly look after himself, as when he attempts to work he gets tired out, weak, nervous, and is unable to finish the simplest job; cannot concentrate; his memory at times is very poor and at other times better. His sleep is variable. He never dreams.

He has been out of the hospital for five months now during which time he has been in Glacier National Park. He is applying for more compensation in order that he may employ someone to look after him and see that he takes proper care of himself and eats at proper hours.

Neurological Examination: Pupils were equal, reacted to light and accommodation. Ophthalmoscopic examination showed no choking. Eye movements normal. No facial assymmetry. Tongue projected in midline. Other cranial nerves apparently normal. There was some tremor of the extended fingers. Co-ordination on F-N and F-F tests good. Patient held himself extremely tensely during the entire examination. The slightest touch, especially if unexpected caused him to jump violently, even when a hand was placed upon his knee. There was no evidence of any paralysis or paresis. Sensory examination unsatisfactory owing to "jumpiness" but no sensory changes made out to touch, pain, or deep muscle sense. Vibration sense was extremely acute. Deep reflexes both arms and legs markedly exaggerated but ap-

parently symmetrical. Normal Babinski responses both sides.

Mentally: No hallucinations made out. No definite delusions except that patient stated that he was ill treated while being cared for in one of the sanatariums. He had the highest praise for doctors of District #10 and for U. S. P. H. S. #68, stating that they had co-operated in every way. Stream of thought was a little impaired as it was difficult to get a perfectly clear, coherent history and there was a little tendency to shift from one subject to another. There was no retardation, no peculiarities in mode of expression noted. He was moderately quiet and composed while being talked to and fairly well relaxed until the physical examination began. He was open, fairly accessible; attention good; alert; communicative. In subtracting sevens from one hundred, he made three unrecognized errors in one minute. His insight into his condition was fairly good. [93]

Blood pressure 132/82. Heart sounds clear and regular—rate 76 (?).

Patient impresses me as being unfit at this time to assume any responsibility or to earn his living in view of his previous long hospitalization, that he would be incapacitated for some time to come, and as he finds that he reacts well to life in the mountains I believe it would be to his interest to continue such life rather than further hospitalization—at any rate at this time.

Patient has apparently partially recovered from a psychosis—type undetermined at this examina-

tion. In view of having seen the patient only once and not having a complete history of his actions and illness while in the hospitals, I am unwilling at this time to make a more binding diagnosis.

A. W. MORRISON, M. D.

AWM:D.

Office of the District Supervisor, District No. 10.

TREASURY DEPARTMENT.
UNITED STATES.
PUBLIC HEALTH SERVICE.
MINNEAPOLIS, MINN.

November 8, 1921.

NEURO-PSYCHIATRIC CONSULTANT'S REPORT.

McGovern, Herbert H. C–193 312.
U. S. Navy Reserve M. M. 1/c.
Kalispell, Mont., Box 396.

NEUROLOGICAL HISTORY: Claimant reported for examination this morning. Offered very little complaint of any kind; just states he was here because he was sent for an examination. Did not go into detail in regard to any of his past experiences, nor would he make any remarks about disagreeable incidents occurring during any period of his life. He did not volunteer any information nor did he offer any complaint. It was useless to make an attempt to obtain a history from claimant.

NEUROLOGICAL EXAMINATION: Muscular tone good, all voluntary movements being carried out accurately and well. There were no spasms or tremors of any muscle groups to be seen. There

were no areas of tenderness along any of the nerve trunks, nor were there any areas of referred pain. There were no areas of anesthesia, hyperaesthesia, etc. Pupils were equal and reacted to light and accommodation. No ptosis, nystagmus or von-Graefe. Other cranial nerves apparently normal. Reflexes all active and symmetrical, with the exception of the knee jerks which were equally decreased. Co-ordination tests carried out well. Gait shows no impairment, nor do the special senses.

MENTAL EXAMINATION: Male, white, adult, well developed and nourished. Neat and clean in personal appearance. Was reticent and evasive thruout examination. He was easily distracted by sudden noises, such as the slamming of a door, or the dropping of an implement, either of which made him jump out of his chair. He co-operated poorly and went into minute details about some treatment received at St. Barnabas Hospital and also at Asbury Hospital. Was somewhat flighty in his ideas, jumping from one topic to another without any suggestions on the part of the examiner. He seemed to be under high nervous tension. His greatest [94] desire seemed to be to get out. He claims that at times he has a desire to walk around and holler, but will not go into details when questioned on this. Insight fairly good, general grasp of things fairly good. Was orientated for time, place, and persons. Retention was poor. Constantly picked and pushed different objects around in the examiner's room.

Appeared fidgety and restless. Memory for past and present events fairly good. Hallucinations and delusions were denied. There were marked trends of persecution on the part of various neighbors and different officials but he offers no detailed information when questioned on same. There was marked psychomotor hyperactivity.

DIAGNOSIS: Phychosis in stage of remission at present. (Probably Manic depressive psychosis.)

PROGNOSIS: Guarded.

TREATMENT RECOMMENDED: Patient is at present working on a farm and claims to be getting along fairly well. Advise that he be encouraged to continue this vocation.

Has claimant a vocational handicap? Yes. Due to service? Yes.

Recommendations:

(a) Is the patient suffering from a disorder requiring constant supervision and totally unable to make a social adjustment? Yes.

(b) Is the patient suffering from a disorder requiring supervision and with it is able to adapt himself to social usages? No.

(c) Is the patient suffering from a residuum of a previous disorder and able to adapt himself to social usages without supervision? No.

In your opinion is it advisable that claimant resume his former occupation? Partially.

(a) Is training feasible? No.

D. S. BABTKIS,
Consultant Neurologist.

TREASURY DEPARTMENT.
UNITED STATES.
PUBLIC HEALTH SERVICE.

WSB:MH.

Minneapolis, Minn. 1/17/22.
Keith-Plaza Building,
Minneapolis, Minnesota,
Examined: Nov. 7, 1921.

McGovern, Herbert H. Jr. C–193 312.
U. S. N. Reserve, M. M. 1/c#.
Kalispell, Mont. Box 396.
Enlisted: June 17, 1917.
Discharged: Oct. 17, 1918.
Nativity: Minnesota.
Age: 30, white, single.
Previous occupation: Mining engineer.
Present: None. [95]

MILITARY HISTORY: Claimant discharged from service as a tuberculous patient. Was in hospital from May, 1918, to October, 1918, at Base Hospital, New London, Conn., Eastern Point, and Woodmen, Montana. Comes in with letter from Assistant Chief in Charge Psychiatry for neurological and chest examinations.

PRESENT COMPLAINT: Occasional cough. Nervousness.

PHYSICAL EXAMINATION: General well developed, well nourished. Head negative. Teeth in good repair. Tonsils mildly hypertrophied. Chest flat, partly due to posture. Impaired breath sounds, and occasional deep rales in left apex.

Heart rapid, no hypertrophy or murmurs. Pulse 110. Abdomen and extremities negative.

REFERRED TO DR. R. R. HEIN, CHEST CONSULTANT, who reports Nov. 7, 1921: Inspection—Stoop shouldered, body well nourished, expansion poor. Temperature 37.3, pulse 115 at 10:30 A. M. Present complaint: Cough, moderately more in morning, with some expectoration. Shortness of breath, weakness, night sweats, average once a week, chills and cold sweats. Examination: Expansion very limited. No rales noted. Resonance good. Diagnosis: Pulmonary tuberculosis. Revealed by X-ray. Remarks: This man has been living in mountain glacier park for past six months and I recommend he return to quiet life at Glacier Park.

REPORT OF X-RAY EXAMINATION. November 9, 1921: Steroscopic plates were made of the chest. These show the diaphragm shadows clear on both sides, no evidence of fluid in either chest. The heart and aorta shadows are normal in size, shape, and position. There is a slight nodulated peri-bronchial tuberculosis involving both upper lobes. The remainder of both lungs is clear. Conclusions: Peri-bronchial tuberculosis both upper lobes. Clinical significance doubtful.

DIAGNOSIS: 1. Manic Depressive psychosis.
2. Pulmonary tuberculosis.

PROGNOSIS: 1. Poor. 2. Fair.

REMARKS: Claimant is partially able to resume former occupation and it is advised. Claimant is not bed ridden and is able to travel. Hospi-

tal care not advised. Claimant will not accept.

Vocational handicap 10% plus, major. Training not feasible.

W. S. BROKER,
Examiner,
U. S. V. B.

Auth: Ltr. Chief Relief Section.
Encl: 2 N. P. Reports.

U. S. VETERANS' BUREAU.
NEURO-PSYCHIATRIC ATTENDING SPECIALISTS' REPORT.
(To be attached to general examination report.)

Place—Minneapolis, Minn. Date—Nov. 10, 1921.
Name of Patient—McGovern, Herbert H. Jr. C-193 312.
Rank and Organization—Mec. Mate. 1/c U. S. N.
Address—Kalispell, Mont.

1. Nervous and Mental History: In good health when entered service June, 1917. Then in good health until May, 1918. Gassed by gas from storage [96] battery, over worked. Sent to Base Hospital in Couvre. In hospitals until discharged S. C. D. Oct. 17, 1918. Felt weak, nervous, having fainting spells. Diagnosed tuberculosis May, 1918. At this time feels weak and nervous, poor sleep, poor appetite. Not able to do any work since discharge. December 1920, doesn't remember events except that he was in sanatarium. June 1918 had first faiting spell. Since then has had fainting spells as often

as several a day. They last five minutes to three hours. Always brought on by argument or some excitement. Never bit tongue, does not jerk but lies still. After spell feels weak, severe headache, and dizzy. If lives alone does not have spells so often.

2. Neurological Examination: Color and nutrition good. Pupils equal and react normally. Slight nystogmoid movements laterally, both eyes. Has photophobia, cornea injected. Deep and superficial reflexes all present and greatly exaggerated symmetrical. Rhomberg and Babinski negative. Is very hypersensative to touch and pin point all over. Appears restless and jumpy, at one time jumped with a scream when testing for Babinski. Also jumped away from light when testing pupil reflexes.
3. Mental Examination: Memory fairly good. Has some suspicions that certain doctors may not treat him right. States there are certain people that he stays clear of. Is emotional and cries easily. Has phobias, especially of doctors. Can't concentrate on work. No hallucinations made out.
4. DIAGNOSIS: Constitutional instability with paranoid trend.
5. PROGNOSIS: Guarded.
6. Treatment Recommended:
7. Vocational Handicap Yes. Major, Minor or less than 10%. Traceable to service. Yes. Is training feasible? No.

Kind of training advised .....
Supervision required .....

(a) Is the patient suffering from a disorder requiring constant supervision, and totally unable to make a social adjustment No.

(b) Is the patient suffering from a disorder requiring supervision and with it is able to adapt himself to social usages Yes.

(c) Is the patient suffering from a disorder requiring a minimum of supervision and with it able to adapt himself to social usages .....

(d) Is the patient suffering from a residuum of a previous disorder and able to adapt himself to social usages without supervision No.

8. Remarks—Not advisable to resume former occupation.
9. Final disposition .....
10. When is another examination necessary .....

JULIUS JOHNSON, M. D.,
Name of Examiner.

Mr. MOLUMBY.—Exhibit 9 is a photostatic copy of the statement of W. C. Braisted, with the first endorsement signed by Victor Blue, which is a statement of his condition prior to his discharge, while in the hospital.

The COURT.—Doctors? [97]

Mr. MOLUMBY.—Yes, they are both doctors; I am sure they are doctors; they are men in charge

of the hospital where he was stationed prior to his discharge from the navy.

PLAINTIFF'S EXHIBIT IX.

UNITED STATES OF AMERICA.

UNITED STATES VETERANS' BUREAU.

March 17, 1922.

PURSUANT to Section 862 of the Revised Statutes, I hereby certify that the annexed photostatic copies of Statement of W. C. Braisted dated July 30, 1919; First Indorsement dated July 14, 1919, signed Victor Blue, are true copies of the originals on file in this Bureau.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States Veterans' Bureau to be affixed, on the day and year first above written.

[Seal] C. R. FORBES,
Director of the United States Veterans' Bureau.

DEPARTMENT OF THE NAVY.

BUREAU OF MEDICINE & SURGERY.

WASHINGTON, D. C.

July 30, 1919.

To: Bureau of War Risk Insurance,
Treasury Department, Washington, D. C.

Subject: Case, C–#193312, Herbert Hugh McGOVERN, Jr. USNRF.

Reference: Call of June 18, 1919 to War Dept. (Inclosed)

In the case of the above named the records of this Bureau show as follows: [98]

Born: Place Shurben, Minn. Date 6–22–93.

Enlisted: Place Puget Sound, Wash. Date 6–19–17.

Discharged: Place Nav. Hosp. Fort Lyon, Colo. Date Oct. (?) 1918.

Diagnosis: Tuberculosis, chronic pulmonary.

Origin is in the line of duty. Disability not result of own misconduct.

Facts are as follows: Patient has been under treatment since June 26, 1918. On admission to Nav. Hosp., New London, Conn., he complained of persistent cough, with profuse expectoration; and has raised considerable bloody sputum; drenching night sweats. Present symptoms one month prior to admission, according to his statement. Physical expiration. to left stornum in 3d to 4th interspace relative dullness, with bronchial breathing and fine moist rales. Moderate dullness in both apices. X-Ray shows infiltration both apices, marked on right with peri-bronchial thickening of hilus of right lung. Sputum repeatedly negative for T. B.

Was transferred from the Hospital at New London, Conn., to Fort Lyon, Colo. When he was surveyed from the Service was under treatment at the Modern Woodmen's Sanitarium at Colorado Springs, Colo.

Present condition—Unfit for the Service.

Probable future duration—Permanent.

Recommendation—That he be discharged from the U. S. Naval Service at *thi* own request and

contrary to the advice of his medical Officer, notwithstanding this it is thought that this recommendation is in the interest of both the patient and the Government.

W. C. BRAISTED,
A.

NAVY DEPARTMENT.
BUREAU OF NAVIGATION.
WASHINGTON, D. C.

N–640–GAD–HN–Q.
July 14, 1919.

1st Endorsement.
To: Bureau of Medicine and Surgery.
Subject: McGOVERN, Herbert Hugh, Jr. 1161951, EX–M. M. 1c., USNRF.
Re. Medical History.

The attached communication from the Chief Medical Advisor, Bureau of War Risk Insurance, Washington, D. C., is forwarded with the request that he be furnished with the facts in connection with the medical history of the above-named man. Records show that this man was discharged on October 17, 1918, at Naval Hospital, Fort Lyon, Colorado.

VICTOR BLUE,
CPS. [99]

Mr. MOLUMBY.—Exhibit 10 is a statement from the District Manager of the Veterans' Bureau, Minneapolis, to the Director of the Veterans' Bureau, concerning the history of his case:

PLAINTIFF'S EXHIBIT X.

UNITED STATES OF AMERICA.

UNITED STATES VETERANS' BUREAU.

March 16, 1922.

PURSUANT to Section 862 of the Revised Statutes, I hereby certify that the annexed photostatic copy of Letter dated Feb. 1, 1922, signed C. D. Hibbard, District Manager, No. 10, is a true copy of the original on file in this Bureau.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the United States Veterans' Bureau to be affixed, on the day and year first above written.

C. R. FORBES,

Director of the United States Veterans' Bureau.

FEDERAL BOARD FOR VOCATIONAL EDUCATION.

DIVISION OF VOCATIONAL REHABILITATION.

DISTRICT VOCATIONAL OFFICE.

February 1, 1922.

M4–JMC;MS.

RE: Herbert Hugh McGovern,
C–193 312.
Kalispell, Mont.

Director,
U. S. Veterans' Bureau,
Washington, D. C.

ATTENTION: Medical Division, Chief Rating Section.

Dear Sir:

On January 2, 1922, the Bureau requested an ex-

amination of the above-named claimant by a competent Neuro-Psychiatrist. On January 19, 1922, this office submitted to the Bureau copies of examination. Dr. C. Michaels reports: [100]

"The case of Mr. McGovern has required considerable attention on the part of our Sub-District Office at Helena, Mont. and also our District Office. Mr. McGovern went thru a psychosis and was hospitalized for that trouble at the Minneapolis Sanitorium from December 9, 1920, to February 1, 1921; he made a partial recvovery from that psychosis in that his intellectual status was greatly improved. However, his emotional instability and paranoid attitude has continued very prominently ever since. Our reports from the field show that he has shown no ability to provide for himself at all. He is making no social adjustment whatever and is requiring constant supervision. He left U. S. P. H. S. Hospital #68, Minneapolis, Minn., last summer and was placed in a cottage near the lake, but it should be added that was feasible only thru the constant assistance given him by friends. It is our opinion that his present disability is continued evidence of his psychopathic constitution. As a matter of fact, the remission that he has had has been only partial. It seems to me that because he has actually gone thru a psychosis that his present condition is still actually psychotic in nature.

We respectfully request that the rating Section

review his case again and notify this office what action, if any, has been taken thereon."

Respectfully,

C. D. HIBBARD,

District Manager, No. 10, U. S. Veterans' Bureau.

By H. D. WILLIAMS.

Mr. MOLUMBY.—Exhibit 11 is a photostatic copy of medical reports of Dr. W. S. Anderson, Dr. Leroy Southmayd, Dr. Hugh Debalim and Dr. J. L. McDonald:

PLAINTIFF'S EXHIBIT XI.

UNITED STATES OF AMERICA.
UNITED STATES VETERANS' BUREAU.

March 23, 1922.

PURSUANT to Section 862 of the Revised Statutes, I hereby certify that the annexed photostatic copies of Medical Report signed W. S. Anderson, dated Sept. 20, 1921; Report of LeRoy Southmayd, M. D., dated Nov. 27, 1920; Medical Report of LeRoy Southmayd, M. D., dated Nov. 24, 1920; Report of Hugh de Valin, Surgeon, Supervisor, 13th District, dated Feb. 25, 1920; Report of Medical Examination dated Sept. 1, 1919, signed J. L. McDonald, M. D., are true copies of the originals on file in this Bureau.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the United States

Veterans' Bureau to be affixed, on the day and year [101] first above written.

C. R. FORBES,
Director of the United States Veterans' Bureau.

REPORT OF PHYSICAL EXAMINATION.

U. S. PUBLIC HEALTH SERVICE.

C. No. 193312.
D. No. 10.
ARMY SER. Navy.

BUREAU OF WAR RISK INSURANCE.
FEDERAL BOARD FOR VOCATIONAL EDUCATION.

1. Claimant's name—McGovern, Jr., Herbert Hugh S.
2. Service, Rank and organization—U. S. Navy Reserve MN1c1 Naval Hosp., Ft. Lyons, Colo.
3. Present address—Kalispell, Mont. Box 396.
4. Age—30.
5. Color—White.
6. Principal prewar civil occupation Mining Engineer.
7. Date of induction—June 19, 1917.
8. Date of discharge—Oct. 17, 1918.

Read Instructions on Bank Before Commencing Examination.

9. Brief history of claimant's disability during service: After enrollment was assigned to SC #42 where he had charge of all mechanical apparatus on ship. Salt water got in storage batteries causing chlorine gas by com-

bination with Sulphuric acid in batteries. Claimant breathed this gas and was sent to hospital Base Hosp. New London, Conn. Diagnosed as T. B. and sent to various hospitals until discharge at Ft. Lyons, Colo. Naval T. B. Hosp. Oct. 17, (1921) 1918. Had frequent unconscious spells at hospitals.

Since discharge: Has "fainting" spells frequently, has difficulty in breathing, can do no work. Is drawing full compensation (temporary).

10. Present complaint (subjective symptoms, not diagnosis); Weakness, fainting spells, nervousness, when he gets excited.

11. Physical examination: (Claimant must be stripped; for tuberculosis examination use other side. If X-ray examination has been made, give the date, place, and authorship of the radiogram.)

Well developed and well nourished.

Eyes, ears, nose, mouth and throat; negative.

The eye reflexes are sluggish. Other reflexes are exaggerated.

Abdomen, inguinal rings and genitalia, and extremities; negative.

Heart: Pulse before exercise 84; after 90; Two minutes after, 84.

Chest: Stopped shouldered and hollow chested. Lungs show mobility decreased; prolonged expiration under the scapula each side. No rales. Diminished reso-

nance under each scapula. No increased fremitus.

Remarks: In view of this patient's history and chest finding; think he should be referred to a neuro phychiatrist and to an internist for examination of his lungs. This man will accept hospital care; only if he is sent to the Ashbury Hospital, Minneapolis.

Vision (Snellen chart)

(Uncorrected R20/20L20/20)

(Corrected by claimant's glasses R20/ L20/)

Hearing (spoken voice)

(R20/20

(L20/20 [102]

12. Diagnosis: 1. Psycho Neurosis. 2. Epilepsy, suspected. 3. Chronic Bronchitis. 4. Tuberculosis, pulmonary, suspected.
13. Prognosis: 1, 2 & 3 Undetermined. 4. Undetermined.
14. Is claimant able to resume his prewar occupation? No. 15. Is claimant bedridden? No. 16. Is claimant able to travel? Yes. 17. Do you advise hospital care? Yes. 18. Will claimant accept hospital care? Yes. 19. Has claimant a vocational handicap? (See par. 19 on reverse.) Yes. 20. Is his physical and mental condition such that vocational training is feasible? No. Over 10%. 21. Did you examine the man on this date? Yes.

22. Place: Kalispel, Mont. Date: Sept. 20, 1921.

Name—W. S. Anderson, M. D. Title—Act. Asst. Surg. Vet. Bur.

B. W. R. I.

This report is in response to B. W. R. I. request of ——, 192—.

_____

Supervisor, Dist. No. ——

F. B. V. E.

In my opinion the disability is —— due to service. Training is —— feasible. The applicant has —— a vocational handicap. Follow up report is —— every —— days.

Date ————

_____

INSTRUCTIONS FOR FILLING OUT THIS REPORT.

(Number of paragraphs correspond to questions on other side.)

1. Check letter (S. M. W. D.) showing marital state.

9. Give a BRIEF history as stated by the claimant, showing the connection between his disability and his military service. Give nature of injury or illness, when and where incurred and treated, and whether discharged on that account.

11. (a) In recording the results of a physical examination, do NOT give a diagnosis; give the PHYSICAL SIGNS as you find them.

(b) In cases of WOUNDS, give location and size of scars and whether or not they are adherent and tender. ALSO, a description of the in-

jury to the underlying structures, with the resulting deformity, disturbed function, and limitation of motion expressed in degrees. Similar notation must be made in case of arthritis.

(c) When the applicant complains of dyspnaea on exertion as a sequela of GASSING, HEART DISEASE, or bronchial ASTHMA, note his pulse and respiration before, just after, and 2 minutes after exercise, which should consist of hopping 25 times on each foot.

(d) In cases of HEART DISEASE, give general appearance, location of apex beat, and time of occurrence, location, and direction of transmission of murmurs, and rate and rhythm of pulse.

(e) If the claimant is wearing glasses, record the vision as corrected thereby. It is not expected that the general examiner will attest to fit proper lenses. If impairment of vision or hearing is found, the case should be referred according to the District Supervisor's instructions.

(f) If cases of neuropsychoses, an additional special report must be rendered by a competent neuropsychiatrist. Refer these cases according to the District Supervisor's instructions.

(g) If, in addition to the disability due to service, the man has any other impairment, describe it fully.

12. Use the nomenclature of the United States Public Health Service.

19. A claimant is considered to have a vocational HANDICAP when his disability would constitute a handicap in his principal prewar occupation, such as to affect employability or earning power. [103]

Men without a vocation, i. e., students, and those who have not worked at one occupation more than one year and are under 21 year of age, should have their handicaps considered in light of the general labor market.

20. Training is feasible when the mental and physical conditions permit AND when the suggested occupation is not incompatible with his disability.

SPECIAL TUBERCULOSIS REPORT.

(In cases of suspected pulmonary tuberculosis, the following information must be furnished in addition to the report on the other side of this sheet.)

If the man has been treated since discharge from military or naval service, give the name and address of hospital or physician, with dates, and the disability for which he was treated. In recording the physical examination use form below, filling in all blanks carefully.

Height, with shoes —— inches. Weight (without coat) ——. Did you weigh the man yourself? ——. Normal ——. Highest (lbs.) —— (Within 1 year, date). Lowest (lbs.) —— (Within 1 year, date). Sputum: Positive or negative ——. If negative, how many specimens were examined? ——. (Do not de-

fer sending report if sputum examination is not feasible, providing diagnosis is clear.)

EXAMINATION OF CHEST.

Shape: Mobility:

Palpitation: Fremitus:

Percussion: R. Lung:

L Lung:

Auscultation: R. Lung:

L. Lung:

(No examination is acceptable without auscultation during normal inspiration, following expiratory cough.)

Summary: Here indicate areas of infiltration, consolidation, etc., lobe by lobe:

Diagnosis:

Classification—National Tuberculosis Association Standards.

Condition—Active, quiescent, apparently arrested, or arrested. (Underscore the condition found.)

State—Incipient, moderately advanced, or advanced. (Underscore the stage found.)

Note.—When for any reason the diagnosis is doubtful, report is as UNDETERMINED and refer the claimant to a hospital with special facilities for making diagnosis, advising him at the same time that his examination has not been completed.

Name of examiner ————————.

Address ————————. [104]

TREASURY DEPARTMENT.
UNITED STATES.
PUBLIC HEALTH SERVICE.

Great Falls, Mont., Nov. 27, 1920.

From: LeRoy Southmayd, M. D.
Consultant at Great Falls, Mont.

To: District Headquarters, 10th Dist., U. S. P. H. S.
Keith-Plaza Bldg., Minneapolis, Minn.

Subject: Herbert McGovern, Jr. C—193312.
M. M. 1st Cl. U. S. N. R. F.
Marion, Mont.

I report that this man was discharged from Columbus Hospital on Nov. 27, 1920, as he had received transportation to Minneapolis permitting him to enter a tuberculosis sanatarium.

LeROY SOUTHMAYD, M. D.,
Consultant.

TREASURY DEPARTMENT.
UNITED STATES.
PUBLIC HEALTH SERVICE.

Great Falls, Montana, Nov. 24, 1920.

From: LeRoy Southmayd, M. D.
Consultant at Great Falls, Mont.

To: District Headquarters, 10th Dist., U. S. P. H. S.
(Attention of Dr. Bracken.)
Keith-Plaza Bldg., Minneapolis, Minn.

Subject: Herbert H. McGovern, Jr. C—193312.
Marion, Montana. M. M. 1st Cl. U. S. N.-R. F.
Present Address: Columbus Hospital,
Great Falls, Mont.

This man gives a history of having had pulmonary tuberculosis ever since his discharge from the service on October 17, 1918. He has been in various hospitals the greater part of the time since then. He applied to-day for treatment and I have sent him to Columbus Hospital, this city. He showed me a letter dated Sept. 25, 1920, to him from Dr. H. M. Bracken in which he advises him that, if at any time he wishes sanatarium care, that he would be placed where he would be taken care of at the expense of the federal Government.

I would advise that transportation be sent to him so that he may be admitted to some tuberculosis sanatarium.

LeROY SOUTHMAYD, M. D.,
Consultant. [105]

TREASURY DEPARTMENT.
UNITED STATES.
PUBLIC HEALTH SERVICE.

Seattle, Wash., Feb. 25, 1920.

From: Supervisor, 13th District,
U. S. Public Health Service.

To: Chief Medical Advisor,
Bureau of War Risk Insurance,
Washington, D. C.

Subject: Herbert Hugh McGovern. C—193,312.
253 E. 39th St.,
Portland, Oregon.

1. Report the above-named man at Soldiers' Home, California.

HUGH de VALIN,
Surgeon U. S. P. H. S.
Supervisor, 13th District.

JRMcD:LN.

REPORT OF PHYSICAL EXAMINATION.
PAYETTE, IDAHO.

September 1st, 1919.

1. Name—Herbert McGovern. (193312.)
2. Rank & Organization—Mach. Mate, U. S. N. R. F.
3. Present Address—Roseberry, Idaho.
4. Age—26. Color—White. Previous occupation—Mining engineer.
5. Brief military history of claimants disibility—While working in engine room *room* of S. C. 42 salt water got into storage batteries from faulty corking of deck causing sulphuric acid fumes to be given off, also engine room gas affecting claimant's lungs.
6. Present complaint—Weakness to Chronic cough.
7. Physical examination—Chronic Tuberculosis. Some slight moist in middle lobe of right lung. Otherwise physical condition O. K.
8. Diagnosis—Arrested Tuberculosis "X ray" Chi. Pul. 1241.
9. Prognosis—Poor. [106]
10. Is claimant able to resume former occupation? No.
11. Do you advise it? No.

12. Is claimant bed ridden? No.
13. Is claimant able to travel? Yes.
14. Do you advise hospital care? Yes.
15. Will claimant accept hospital care? No.
16. Remarks: Only determination was X-ray.

J. L. McDONALD, M. D.

Mr. MOLUMBY.—Exhibit 12 is a photostatic copy of report of Dr. R. A. Thornley, the report for the General Counsel signed by Robert Hugh Patterson, Assistant Director.

PLAINTIFF'S EXHIBIT XII.

UNITED STATES OF AMERICA.

UNITED STATES VETERANS' BUREAU.

March 16, 1922.

PURSUANT to Section 822 of the Revised Statutes, I hereby certify that the annexed photostatic copies of Medical Report of R. A. Thornley, M. D., dated Oct. 5, 1921; Report for the General Counsel dated Jan. 3, 1922, signed Robt. U. Patterson, Assistant Director. are true copies of the originals on file in this Bureau.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the United States Veterans' Bureau to be affixed, on the day and year first above written.

C. R. FORBES,

Director of the United States Veterans' Bureau.

[107]

TREASURY DEPARTMENT.
BUREAU OF WAR RISK INSURANCE.

Date—October 5, 1921.

MEMORANDUM.

From: Dr. R. A. Thornley.

To: File.

Subject: Neuro-Psychiatric Resume, C—193,312.
in case of Herbert Hugh McGovern, Jr.

The records of the Bureau from Medicine and Surgery, Navy Department, shows claimant enlisted June 19, 1917, at Puget Sound, Washington; that he was discharged October (??) 1918, at the Naval Hospital, Fort Lyon, Colo., for Tuberculosis, chronic Pulmonary—origin is in line of duty—disability not the result of own misconduct. The record further shows patient was under treatment from June 26, 1918, having been admitted to Fort Lyon, Colo., from the Hospital at New London, Conn. When he was surveyed from the service he was under treatment at the Modern Woodmen's Sanatorium, at Colorado Springs, Colorado. The records of the Bureau of Navigation, Navy Department shows he was discharged October 17, 1918.

Claim was filed April 16, 1919, alleging "total disability, which began about June 17, 1918, as the result of gas from salt water getting into storage batteries of the engine room. Accompanying this application is a physician's statement, whose name is undecipherable, stating he first treated claimant April 10, 1919, at the Modern Woodmen's Sanatorium, Colorado, for pulmonary Tuberculosis. It

may be possible that this physician was a member of the attending Staff at that Hospital.

The first examination on file is dated September 1, 1919, from Payette, Idaho, by Dr. J. L. McDonald, who gives a diagnosis of Arrested Tuberculosis. The next report is from the Soldiers' Home, Los Angeles, California, in the nature of laboratory report, dated January 1, 1919, which shows the claimant's sputum to be negative.

Claimant was admitted to the Pacific Branch, Soldiers' Home, January 1, 1920, and hospitalized for chronic Tuberculosis, with Negative sputum; was discharged February 25, 1920—same condition existing.

The first evidence of a Neuro-Psychiatric disability in this case is examination on file from the Sacred Heart Hospital, Spokane, Washington, dated May 3, 1920, which gives a diagnosis of Phychosis, *M*ysterical. He was in that hospital from May 3, 1920, to May 13, 1920. The next examination is by Dr. Price, who states, "This man presents no signs of mental disease or feeble mindedness. He has no symptoms of organic nervous disease. The attacks as described are typically hysteric which fact is in harmony with the man's general attitude, longing for attention and craving for sympathy, etc." Dr. Price recommended work for the patient at this time. This examination is undated, but received in the Bureau June 7, 1920.

The next examination on file was made at Kalispell, Montana, September 2, 1920, giving a diagnosis of Tuberculosis, chronic. The prognosis is

stated to be "good," and that claimant was able to resume his former occupation, which was advised by the examining physician, Dr. William S. Little. He was again examined at Great Falls, Montana, by Dr. LeRoy Southmayd, Consultant for the U. S. Public Health Service, who advised that claimant be hospitalized at some Tuberculosis [108] Sanatarium. Attached to this examination, is a general examination by Dr. W. S. Little, and dated a few days previous, namely November 12, 1920, stating, "No pathology found. Claimant is able to resume former occupation, and is not in need of hospitalization."

December 9, 1920, there is a report on file from St. Barnabas Hospital, Minneapolis, Minn., stating that claimant was admitted December 6, 1920. The report further states, "during his short stay in the hospital patient has had several episodes of pronounced disturbances. He became extremely irritable and noisy; talked loudly and the hospital authorities felt unable to care for him in this general hospital. J. C. Michael, Neuro-Psychiatrist, gives a report on the claimant stating, "patient was excitable. He gives an account of not having been able to work since his return from the Navy service; some people irritate him so much he cannot stand it any longer; have given him a lot of "rotten deals" and can't keep mind on one thing; that he can't figure out any mathematical problem." Dr. Michael was under the impression that claimant had an undetermined Psychosis.

Claimant was transferred to the Minneapolis

Sanatarium for observation. Accompanying Dr. Michael's report is a Tuberculosis examination, stating that no signs of active disease found in the lungs.

April 8, 1921, this case was the subject of a special letter from Dr. J. C. Michael, tenth District. The following abstract from Dr. Michael's letter is worthy of note. He states, "according to our history obtained, claimant has been a patient in many different private and Public Health Service Hospitals for a goodly part of the time since his discharge from the Navy. He is now a patient at Hospital No. 68, on the service of the undersigned, in this City. Diagnosis in this case is Constitutional Psychopathic State (Emotional Instability and Paranoid trend). He is unable at all to provide for himself, and to our best judgment it appears he will be unable to do so for an indefinite period, because of the chronic nature of his condition. The emotional instability and paranoid trends are sufficiently pronounced to cause this disability, yet general intelligence, information and insight show no particular disintegrating. Whatever abnormal conduct there has been is accountable to his paranoid ideas limited to his own bodily condition principally.

The second letter from Dr. Michael, dated April 26, 1921, states, "On April 3, 1920, this office wrote to you regarding the compensation status of the above-named, quoting also present condition, diagnosis and prognosis in the case. It was furthermore advised that a legal guardian was not con-

sidered necessary for this man in as much as mental deterioration was not present, and that the father of claimant being a well-established business man was on good terms with his son, and desires in co-operation with claimant to look after his financial affairs.

From February 8, 1921, to May 14, 1921, claimant was a patient at the U. S. Public Health Service Hospital #68, Minneapolis, Minn. He presented at this time Weakness; "fainting spells" anorezia, Nervousness; Hyper-excitability; dyspnoea; don't like to mix with people; feels weak in knees.

A careful neuro-psychiatric examination brought about the conclusion that this claimant did not present any signs of disseminated Multiple Sclerosis, but presented mental anxiety with additional paranoid trend. The diagnosis is given as Constitutional Psychopathic Inferiority (without Psychosis) but with emotional instability prominent and some paranoid trends. [109]

July 14, 1921, a report was submitted regarding the permanent and total status of the case, signed by Dr. J. C. Michael and Dr. D. S. Babthis, Minneapolis, Minn. In answer to the question with reference to the duration of the disability it is stated, "probably continue for a long time."

August 11, 1921, this Bureau was advised by Loy J. Molumby, Lawyer, Great Falls, Montana, that he had been discharged as this claimant's guardian; that the claimant was now living with his father at Kalispell, Montana.

COMMENT.

From a neuro-psychiatric standpoint this case has not been unusual. H was diagnosed in the navy as a case of Chronic Pulmonary Tuberculosis, and discharged therefrom as the result of this disability. Claimant has drifted about from one hospital to another seeking relief of his Tubercular condition. As a matter of fact he has suffered undoubtedly from over-hospitalization, and the perfectly natural mental attitude frequently resulting from more continued contact with other patients. He is now emotionally unstable, and has ideas that he has been unfairly dealt with which are given a name, paranoid. This man is not insane. He is mentally responsible, being apparently unable to make a social readjustment due to his condition. His reaction toward his environment is inadequate, and the sum total of his disability from a neuro-psychiatric standpoint is entirely emotional. Although variously diagnosed in the past as Psychosis, undifferentiated; Hysteria; Manic Depressive and Neurasthenia, he undoubtedly has none of these conditions.

That this man is not permanently nor totally disabled at the present time, as the result of his Constitutional Psychopathic Inferiority, Emotional Instability and so-called paranoid trend, is quite evident in examination report of his progress, while at U. S. Public Health Service Hospital #68, which shows, "this man made every substantial progress the last few weeks. Notice in regard to his compensation status and psycho-therapy gave apparently good results." This is the only reference in

the file to the part which compensation, and a desire for compensation may have in this case. Apparently the assurance that progress was being made in this man's case toward adjustment of his compensation served to allay much of his emotional instability and conflict. It must of course be remembered that he has always been a Constitutional Psychopathic Inferior. Since the condition is congenital, it will undoubtedly remain so. This much of his condition cannot be considered as the result of his service or as an aggravation thereto. There is every indication that claimant will not only recover from his emotional conflict, but that he *is* very much improved.

Therefore, from a Neuro-Psychiatric standpoint the case should be rated:

Less than 10% from date of separation from active service, October 17, 1918, to May 3, 1920; total temporary from May 3, 1920, to May 13, 1920. Temporary partial 10% from May 13, 1920, to December 9, 1920; Total temporary from December 9, 1920, to May 14, 1921; temporary partial 10% from May 14, 1921, for Constitutional Psychopathic Inferiority with superimposed emotional Instability and paranoid trend. Held as acquired in service or aggravated by service in accordance with provisions of Section 18, Public No. 47.

R. A. THORNLEY,
Chief, Neuro-Psychiatric Branch. [110]

January 3, 1922.

MEMORANDUM TO THE GENERAL COUNSEL.

SUBJECT: Herbert Hugh McGovern, M. M. 1/c U. S. N. R. F. C–193 312.

An examination of the file in this case shows that the above captioned claimant was discharged from the Navy October 17, 1918.

The report of the Bureau of Medicine and Surgery is as follows:

> "Patient has been under treatment since June 26, 1918. On admission to Nav. Hosp., New London, Conn., he complained of persistent cough, with profuse expectoration; has raised considerable bloody sputum; drenching night sweats. Present symptoms one month prior to admission, according to his statement. Physical expiration: to left sternum in 3d to 4th interspace relative dullness, with bronchial breathing and fine moist rales. Moderate dullness in both apices. X-Ray shows infiltration both apices, marked on right with peribronchial thickening of hilus of right lung. Sputum repeatedly negative for T. B.
>
> Was transferred from the Hospital at New London, Conn., to Fort Lyon, Colo. When he was surveyed from the Service was under treatment at the Modern Woodmen's Sanatarium at Colorado Springs, Colo.
>
> Present condition—Unfit for the Service.
>
> Probable future duration—Permanent.
>
> Recommendation—That he be discharged

from the U. S. Naval Service at his own request and contrary to the advice of his medical Officer; notwithstanding this, it is thought that this recommendation is in the interest of both the patient and the Government."

Form 526, Application for Compensation, filed April 16, 1919, shows that claimant had not worked since discharge as a result of his illness.

The examination made April 10, 1919, reports the disability as pulmonary tuberculosis and states that the claimant is totally disabled. The work sheet of May 1, 1919, shows that the claimant has been unable to work from that date.

On August 21, 1919, the claimant was rated Temporary Total from date of discharge.

Report of physical examination made September 1, 1919, reports the disability as Tuberculosis arrested: Prognosis—poor; claimant to resume occupation.

The claimant was admitted to the Pacific Branch National Home for Disabled Volunteer Soldiers, Sawtelle, California, January 1, 1920, and discharged February 25, 1920; Diagnosis—chronic pulmonary tuberculosis; sputum negative; temperature as a rule sub-normal. [111]

A report dated May 13, 1920, from Spokane, Washington, states that the claimant was admitted to Sacred Heart Hospital May 3, 1920; Diagnosis—hysterical psychosis, and for this he was rated Temporary Total from the date he was admitted to the hospital to the date discharged, May 13, 1920, and fifteen per cent (15%) subsequent to that. The

rating for tuberculosis was continued as Temporary Total.

The report of examination dated May 13, 1920, by U. S. Public Health Service reports the disability as hysterical psychosis and states that the claimant was sent to the Sacred Heart Hospital for observation.

The report of examination made September 2, 1920, reports the disability as pulmonary tuberculosis. The physical findings given, however, are considered insufficient to warrant such a diagnosis.

The report of examination of November 12, 1920, states that there is no pathology found upon examination. The case was accordingly rated December 17, 1920, "No disability.")

The report of examination by Dr. J. C. Michael, Consultant in Neuro-Psychiatry, dated December 9, 1920, states that the claimant was admitted to St. Barnabas Hospital, Minneapolis, Minnesota, on December 6, 1920. The disability is reported as indeterminate psychosis. This report states that the claimant was being transferred to the Minneapolis Sanatorium for observation and treatment. The examination made on the same date, December 6, 1920, by the Attending Specialist on Tuberculosis, Walter J. Marcley, states that there are no signs of active disease found in the lungs.

The reports in the file show that this claimant was admitted to the Minneapolis Sanatorium December 9, 1920; Diagnosis—manic depressive insanity.

The claimant was transferred from the Asbury

Hospital, Minneapolis, Minnesota, to U. S. Public Health Service Hospital #68, February 7, 1921. Diagnosis—Phychosis.

Papers in the file show that the Secretary of the Red Cross at Great Falls, Montana, informed the Bureau that this claimant was in need of a guardian. This was without the sanction of the District Supervisor or physician in charge of his case. The District Medical Officer states, in his report of April 8, 1921, that he desires payments withheld from the guardian appointed as a result of the activities of the Secretary of the Red Cross, until the matter has been arranged with the claimant and his family. Dr. Michael states that it appears to him that as long as the claimant and his family are willing, that no guardian should be considered, and that the claimant's mental condition has not progressed to such an extent as to warrant appointing a guardian.

The report of May 19, 1921, submitted by Dr. J. C. Michael, U. S. Public Health Service Consultant in Neuro-Psychiatry, reports the disability as "Constitutional Psychopathic Inferiority (without Psychosis), but with emotional instability prominent and some paranoid trends." The report of a Board of three physicians made July 14, 1921, gives the same diagnosis.

The examination made September 20, 1921, reports the disability as Psycho-Neurosis; Epilepsy suspected; chronic bronchitis, and pulmonary tuberculosis suspected. Under remarks the Examiner states that in view of the history and chest findings

he thinks the claimant should be referred to a Neuro-Psychiatrist and Internist for an examination of his lungs. The physical findings reported on this examination do not warrant the diagnosis of bronchitis or tuberculosis. [112]

SUMMARY.

While this patient was reported as having pulmonary tuberculosis in the Navy, and for a number of months subsequent to his discharge, at no time was his sputum positive, and if he ever did have pulmonary tuberculosis it has been arrested; there is no evidence of any lung involvement at the present time, nor has there been for the past year. The reports on file would indicate that the patient is a constitutional psychopath with emotional instability and entitled only to a rating for that disability at this time. There is no evidence in the file to indicate that he is entitled to a Permanent Total rating.

ROBT. U. PATTERSON,
Assistant Director.

Mr. MOLUMBY.—Exhibit 13 is the medical report signed by Dr. F. B. Nather, report of physical examination by Dr. Nather, and report of examination by Dr. George E. Price, endorsement by W. R. Leahey, C. F. Fiege, H. P. Downey and O. E. Denney and also by W. C. Rucker.

PLAINTIFF'S EXHIBIT XIII.

UNITED STATES OF AMERICA.
UNITED STATES VETERANS' BUREAU.
March 17, 1922.

PURSUANT to Section 882 of the Revised Stat-

utes, I hereby certify that the annexed photostatic copies of Medical Report dated May 13, 1920, signed F. B. Nather; Report of Physical Examination dated May 3, 1920, signed F. B. Nather, Surgeou; Medical Report signed George E. Price; Indorsements signed W. T. Leahey, C. F. Fiege, H. O. Downey, C. F. Feige and O. E. Denney; and Memorandum dated March 9, 1920, signed W. C. Rucker, are true copies of the originals on file in this Bureau.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the United States Veterans' Bureau to be affixed, on the day and year first above written.

C. R. FORBES,
Director of the United States Veterans' Bureau.

[113]

ORIGINAL—TO THE CHIEF MEDICAL ADVISOR.

TREASURY DEPARTMENT,
UNITED STATES.
PUBLIC HEALTH SERVICE.

Spokane, Wash., May 13, 1920.
C–193312.

Form: U. S. Public Health Service.
710 Hutton Bldg.

To: Supervisor, 13th District U. S. Public Health Service, 115 White Bldg., Seattle, Wash.

Subject: Hospitalization of Herbert H. McGovern.

1. Admitted to Sacred Heart Hospital May 3, 1920.
2. Diagnosis, psychosis hysterical.

3. He was kept under observation in the hospital and while in the hospital an examination by the consulting Neurologist, Dr. Price, who made a diagnosis of hysteria. He was carefully examined by the medical officers of this station and no organic disease found.
4. He was discharged from the hospital May 13, 1920, condition improved.
5. Diagnosis on discharge was psychosis hysterical.

F. B. NATHER,

A. A. Surgeon, U. S. P. H. S. Medical Officer in Charge.

REPORT OF PHYSICAL EXAMINATION.

Spokane, Wash., May 3, 1920.

(C–193312)

1. Name—Herbert H. McGovern, Jr.
   Army Serial No. none.
2. Rank and Organization—Machinist Mate 1/c U. S. Navy.
3. Age—27. Nativity—Minn. Sex—M. Race—W. Married ——. Single — X. Widower ——. Divorced ——.
4. Previous occupation—Mining Engineer.
5. Present Address—1411 W. Jackson Ave., Spokane, Wash.
6. Permanent Address—Marion, Mont.
7. Brief Military history of claimant's disability: Enrolled June 19, 1917. In May or June, 1918, on S. C. #42, salt water got into storage batteries forming gas—knocking him out Admitted to B. H. at New London, Conn.—

here about [114] 2 months—then to Naval Sanitarium, Fort Lyons, Colo. Here about 1 month, then to Woodman Sanitarium at Colo. Springs, here 1 month. At St. Lukes Hosp. Kansas City for 2 weeks, then came to Connelly, Idaho, where he was under treatment for about 2 months. Then to Soldiers Home Hosp. at Los Angeles, Calif. Here for 2 months then to Spokane. Date of discharge Oct. 17, 1918.

8. Present complaint: Nerves all shot to pieces, weak—can hardly walk.
9. Physical examination: Head, neck and chest normal. Abdomen negative.

Dr. Pierce's report attached hereto:

Herbert H. McGovern, Jr. (Place claimant this sheet in upper hand corner.)

(9 continued.)

1010

10. Diagnosis—Psychosis hysterical.
11. Basis for Diagnosis—Phy. examination Neuro-Psychiatric Ex.
12. Complication, sequela, etc.—None.
13. Where was sickness or disability incurred? On board S. C. #42.
14. How incurred—Gas formation.
15. Disposition—Examined.
16. Condition on disposition—same.
17. Prognosis—Good.
18. Is claimant able to resume former occupation? Yes.
19. Do you advise it? Yes.

20. Is claimant bedridden? No.
21. Is claimant able to travel? Yes.
22. Do you advise hospital care? Yes, for observation.
23. Will claimant accept hospital care? Yes.
24. In your opinion is disability due or traceable *or* Service Yes.
25. The claimant has a vocational handicap which is: (Cross out the two not applying) ~~Major,~~ Minor, ~~Negligible.~~
26. Is his physical and mental condition such that vocational training is feasible? Yes.
27. Remarks: Sent to Sacred Heart Hospital for observation.

F. B. NATHER,
Surgeon U. S. P. H. A.

Examined by F. B. NATHER. [115]

Herbert McGovern.

Neuro-Psychiatric Examination.

This man presents no signs of mental disease or feeble mindedness.

He has no symptoms of organic nervous disease.

The attacks as described by him are typically hysteric which fact is in harmony with the man's general attitude, longing for attention and craving for sympathy.

Diag.: Hysteria.

Recom: Work would be the best form of treatment for this particular case. As this will undoubtedly meet with strenuous opposi-

tion I would suggest his being sent to neurological center for treatment.

GEORGE E. PRICE.

Subject: Herbert H. McGovern, Jr. C–193312.

TREASURY DEPARTMENT,
UNITED STATES.
PUBLIC HEALTH SERVICE.
First Indorsement.

Respectfully transmitted to Governor, Soldiers' Home, Sawtelle, Calif., March 16, 1920.

Requesting reply through this office. Information requested to properly adjust claim for compensation.

By direction of Surgeon LONG:

W. R. LEAHY,
Acting Assistant Surgeon.

2nd Ind.

Pacific Branch, March 18, 1920,—to the Surgeon.

1. Herbert H. McGovern, Jr., late U. S. Naval Reserve, was admitted to this Home February 2, 1920, and discharged on request February 25, 1920. Attached letter is forwarded with the request that you please furnish information requested by indorsement, returning correspondence to this office.

2. By order of the Governor.

C. F. FIEGE,
Adjutant and Inspector.

3d Ind. [116]

Pacific Branch, March 18, 1920—to the Adjutant & Inspector:

(1) Admitted to hospital Jan'y 1, 1920.

(2) Chronic Pulmonary Tuberculosis (Sputa Negative).

(3) Discharged Feb'y 25, 1920, with evidence of Chronic Pulmonary Tuberculosis, and insomnia. Sputa was not found positive. Temperature as a rule sub-normal. Respiration 22 to 28; Pulse 80 to 90.

H. O. DOWNEY,
Surgeon.

4th Ind.

Pacific Branch, March 19, 1920—To the Medical Officer, Bureau of War Risk Ins., 624 Flood Bldg., San Francisco, California.

1. Returned, inviting attention to the foregoing indorsements.

2. By order of the Governor.

C. F. FIEGE,
Adjutant and Inspector.

5th Indorsement.

Respectfully returned to the Chief Medical Advisor, inviting attention to 3d Indorsement regarding HIM; ard–10, Herbert H. McGovern, Mr. C–193312.

By direction of Surgeon LONG.

O. E. DENNEY,
P. A. Surgeon (R).

TREASURY DEPARTMENT.

Washington, March 9, 1920.

From: Chief Medical Advisor.

In Reply Refer to
T. B. Sec.
C–193312.
HIM: ard–10.

To: Pacific Branch Nat. Home, D. V. S.,
Soldiers' Home, California.

Through Supervisor,
District No. 12,
San Francisco, Cal.

Subject: Herbert H. McGovern, Jr.

With reference to this claimant it is requested that the following information be furnished the Bureau. [117]

1. Date admitted to the hospital.
2. Diagnosis and condition when admitted.
3. Date discharged.
4. Diagnosis and condition when discharged.
5. Present diagnosis and condition, if not yet discharged.

It is also requested that the reply from the hospital be made in the form of an indorsement on this letter.

By authority of the Director.

W. C. RUCKER,
Chief Medical Advisor.

Mr. MOLUMBY.—This, your Honor, is a copy of the last rating sheet dated March 14, 1923.

Mr. HIGGINS.—No, it is the original itself, taken from the original Government records of

Washington, which gives him a Total Permanent rating from October 10, 1922, to date. (Marked Exhibit 14 for Plaintiff.)

Mr. HIGGINS.—Could I notice another objection, may it please the Court, for the purpose of the record, that we object to the introduction of any of these exhibits for a purpose other than to show a disagreement between the bureau and the plaintiff, and not for the purpose of showing the disability of the plaintiff, because plaintiff has given no reason why he hasn't called any of these doctors as witnesses, nor any reason why he hasn't taken their depositions; for the further reason that these reports by doctors are based for compensation and not for insurance, and any ratings that are shown in these exhibits are ratings for compensation and not ratings for insurance.

Mr. MOLUMBY.—They are offered both for the purpose of showing a disagreement, which of course is unnecessary because it is admitted by the pleadings, and secondly as admissions on the part of the Government by officers who have authority to and who are in position to make admissions on the part of the Veterans' Bureau.

The COURT.—Doctors, all officers?

Mr. MOLUMBY.—These doctors are all officers of the Veterans' Bureau.

Mr. HIGGINS.—Not all of them.

Mr. MOLUMBY.—All the doctors who have given any ratings whatsoever are doctors of the Veterans' Bureau. [118]

The COURT.—Does it show that?

Mr. MOLUMBY.—I expect to connect that up by questioning Mr. Lawler afterwards.

PLAINTIFF'S EXHIBIT XIV.

UNITED STATES VETERANS' BUREAU.

Central Office Board of Appeals.

Form 6.

CENTRAL OFFICE BOARD OF APPEALS.

RATING SHEET.

Dated—March 14, 1923.

From: Central Office Board of Appeals.

To: Compensation & Claims.

Claimant's Name: Herbert H. McGovern,

Kalispell, Mont.

C–193,312

TF/em.

Based on all evidence in the file at the present time, including such evidence as may be shown by any officially signed memoranda of personal interviews held with claimant or his authorized representative, it is the opinion of this Board that the disability of the claimant above mentioned should be rated:

Temporary total from date of separation from active service to Oct. 9, 1922.

Permanent total on and after Oct. 10, 1922, under Regulation 4, B, IV, (b).

(Psychosis maniac depressive and psychoneurosis.) Service connected.

(See memo to General Counsel, dated Nov. 27, 1922.)

Claimant declared permanently and totally disabled and file will be held in the Central Office.

THOS. FOSTER,
Chairman (Medical).
BRIG. S. YOUNG,
Insurance.

(Name illegible)
Legal

Mr. MOLUMBY.—Exhibit 15 is the rating signed by Robert Hugh Patterson, Assistant Director in Charge of the Medical Division, dated November 9, 1921.

PLAINTIFF'S EXHIBIT XV.

RATING SHEET.

U. S. VETERANS' BUREAU,
Medical Division.
Form 2505. Rev. May, 1921.

Date—Nov. 9, 1921.
WEC/mg 10. [119]

From: Medical Division to Claims Division.
Through: Special Service Section.
Claimant's name: Herbert H. McGovern. C—193-312.
Address: Box 396, Kalispell, Montana.

Based upon all the evidence in the file at the present time, it is my opinion that the disability of the claimant mentioned above should be rated as:

TB.: No pulmonary disability established. (Chronic Bronchitis, suspected Tuberculosis.)

NP.: Less than ten per cent from date of separation from active service (10/17/18) to

5/3/20. Temporary total from 5/3/20 to 5/13/20. Temporary partial 10 per cent (10%) from 5/13/20 to 12/9/20. Temporary total from 12/9/20 to 5/14/21. Temporary partial ten per cent (10%) from 5/14/21. Held as acquired in service or aggravated by service in accordance with provisions of Section 18, Public No. 47. (Constitutional Psychopathic inferiority with superimposed psychoneurosis.)

Exam. 1/2/22.

ROBT. U. PATTERSON,
Assistant Director, in Charge of Medical Division.
By ————————————, M. D.
Chief SMS.

Mr. MOLUMBY.—Exhibit 16 is a rating and adjudication of his case by the Board of Appeals, signed by Robert Hugh Patterson, Assistant Director in Charge of the Veterans' Bureau.

PLAINTIFF'S EXHIBIT XVI.

UNITED STATES VETERANS' BUREAU.
Medical Division.

Form 2505—Rev. Oct. 1921.

Date Dec. 6, 1921.
M. B. of Review—TF/df:10.

From: Medical Division to Claims Division.
Through: Board of Appeals.
Claimant's name: Herbert *P.* McGovern.
Kalispell, Mont. Box 396.
C–193312 N.

Based upon all the evidence in the file at the pres-

ent time, it is my opinion that the disability of the claimant mentioned above should be rated as:

T.B.: Temporary total from date of discharge to Oct. 30, 1920.

Less than ten per cent from Oct. 30, 1920.

Alleged T. B.—Service connected.

[120]

N.P.: Less than ten per cent from date of discharge to May 3, 1920.

Temporary Total from May 3, 1920, to May 13, 1920.

Temporary Partial ten per cent (10%) from May 13, 1920, to Oct. 30, 1920.

Temporary Total from Oct. 31, 1920, to May 15, 1921.

Temporary Partial fifty per cent (50%) from May 15, 1921.

Held as service connected under Section 18, Public 47, 67th Congress. (Practically continuous hospitalization for Constitutional Psychopathic Inferiority with a superimposed emotional instability and paranoid trend.)

Combined: Temporary Total from date of discharge to May 15, 1921.

Temporary Partial fifty per cent (50%) from May 15, 1921.

Constitutional Psychopathic Inferiority with superimposed emotional instability and paranoid trend and Tu-

berculosis chronic apparently arrested.

ROBT. U. PATTERSON,
Asst. Director, in Chg. Med. Div.
By ————————, M. D.
Chairman, Board of Review.

Mr. MOLUMBY.—Exhibit 17 is a communication from General Counsel and an officer of the Veterans' Bureau to the Board of Appeals of the Veterans' Bureau, dated February 14, 1923, concerning the case of Herbert McGovern:

PLAINTIFF'S EXHIBIT XVII.

U. S. VETERANS' BUREAU.
Legal Division.

February 14, 1923.

From: The General Counsel.
To: The Board of Appeals.
Subject: McGovern, Herbert H., MM., 1/c, U. S. N. C–193,312.

Herbert H. McGovern was discharged from the service October 17, 1918, on Surgeon's certificate of disability, because of tuberculosis. On January 1, 1920, he was admitted to the National Home for Disabled Soldiers at Sawtelle, California, and was found to be in a very nervous condition, and suffering from insomnia. On May 3, 1920, he was admitted to the Sacred Heart Hospital, Spokane, Washington, and found to be suffering with hysterical psychosis. Several subsequent examinations show that the sailor was suffering from some mental disorder.

On November 13, 1922, the Medical Board of Re-

view and the Board of Appeals made the following rating in this case: [121]

"Permanent and Total from October 10, 1922, for Psychosis, manic depression and Psychoneurosis.

"Service connected. Regulation 4 B IV (b).

"This rating is made on the advice of Chief Consultant, Col. Roger Brooke, and Dr. G. A. Rowland, whose signatures are attached.

"File will remain in Central Office."

As the evidence in the file clearly shows that the sailor has been continuously unable to follow a substantially gainful occupation since his discharge from the service, your opinion is requested on the following points:

(1) Is it probable that his mental condition resulted from a toxic condition in a tubercular man of neuropathetic makeup in such a manner that his present disability can be said to result from the causes which have existed since the date of discharge; if so, should he not be rated as permanently and totally disabled from discharge because of such conditions?

In the consideration of this question your attention is called to the following excerpt in an opinion of this office to Dr. Thomas Foster, Chairman, Board of Appeals, dated December 19, 1922:

"It is to be noted that the specifications as to symptoms of permanent and total condition contained in section V of the Regulation are not necessarily exclusive but in practice I suppose that you treat them as being so, and it would perhaps be

difficult to proceed in the ordinary run of cases upon any different basis without a revision of the Regulation. However, I think that there is one situation in which you may safely, on proper evidence, make permanent total ratings in cases that do not fall strictly within any of the subdivisions of Section V. The situation to which I refer is that having to do with certain classes of retroactive ratings. That is, cases where ratings have been made which were unquestionably sound and reasonable upon the evidence presented at the time they were made, but which appear in the light of the subsequent course and progress of the disease upon which they were based, to be inaccurate. So long as you have the right to revise a rating retroactively, this subsequent and often very enlightening evidence is certainly entitled to weight. I do not mean to say that simply because one dies from tuberculosis or any other disease that he was necessarily permanently and totally disabled for any appreciable period of time theretofore. His case may never have assumed a permanent aspect, yet, perhaps at a time when his prospect of recovery seemed assured, he may be carried off by some sudden and unfortunate development of the malady. On the other hand, the patient's death or retrogression may unquestionably throw a new light on his condition at a time long prior to its occurrence. It may prove, for instance, that the condition was much more serious than was discovered by former examinations. It may strongly indicate that symptoms were overlooked or that con-

ditions existed which were not marked by their usual symptoms.

"There can be no objection, I think, to taking all of these things into consideration in revising awards retroactively, where such revision is justified by law. * * * "

(2) If you find that McGovern is not entitled to permanent total disability rating from date of discharge, is he not entitled to a permanent and total disability rating from January 1, 1920, the date upon which he was noted to be suffering with a nervous condition, or May 3, 1920, the date upon which he was diagnosed as suffering with hysterical psychosis?

As litigation is pending in this case your careful and prompt consideration will be appreciated.

WILLIAM WOLFF SMITH,
General Counsel.

LAL/sos. [122]
8

TESTIMONY OF L. A. LAWLER, FOR PLAINTIFF (RECALLED).

L. A. LAWLER, recalled on behalf of plaintiff, testified as follows:

I have seen the certified copies of the originals which have just been introduced or offered in evidence. I know who some of the parties are who signed these different ratings and sheets and different medical examinations.

Q. Do you know whether or not all of them are officials of the Veterans' Bureau, either examin-

(Testimony of L. A. Lawler.)

ing doctors or working in the bureau itself as rating officers or doctors?

A. I am not sure just which records you have put in are certified; some of them are not connected with the bureau, as my understanding is. Exhibit 2 is a certified, true copy of a medical report of Herbert Hugh McGovern, Jr., former Machinist Mate, First Class, while in the U. S. Naval Reserve Forces. It was secured under certification from the Navy Department by the Veterans' Bureau, and now a part of the Veterans' Bureau files. Exhibit 3 is plaintiff's application for insurance signed by himself and is an official document of the Government, or a certified copy of an official document.

The COURT.—What is this application for insurance?

A. That was his original application for insurance while he was serving in the navy.

The COURT.—By which he was insured and under which he is now bringing suit? A. Yes.

Q. Exhibit 4, state to the Court what that is.

A. Application of Herbert Hugh McGovern for compensation; report of examining physician on Form 504 by some doctor whose name is illegible. I cannot tell definitely whether that document was made by a doctor working for the bureau, an examining doctor for the Veterans' Bureau, but probably not. Exhibit 5 is the medical rating schedule approved by the director July 15, 1921. That is not the regulations of the Veterans' Bureau. It is just a

(Testimony of L. A. Lawler.)

medical rating schedule. Exhibit 6 is the Brief Face for compensation purposes.

Q. Explain to the Court what you mean by Brief Face, if you will. [123]

A. When a man is adjudged entitled to compensation the examiner of the bureau in charge of his case prepares an award of compensation which he submits to the reviewer for approval, and if approved, an award card is made up for the purpose of paying compensation. This is the Brief Face. This is an official document of the Veterans' Bureau. Exhibit 7 is several rating sheets made by the Medical Division of the Veterans' Bureau for the purpose of determining the amount of compensation to which plaintiff was entitled. It is an official document of the Veterans' Bureau. Exhibit 8 is a report of physical examination by Dr. Morrison, signed by Dr. Babtkis, and report of Dr. Julius Johnson. I believe both of them are, or they were at the time, officials of the Veterans' Bureau. That is also an official document of the Veterans' Bureau. Exhibit 9 is a statement of W. C. Braisted of the Navy Department concerning McGovern's record in the navy.

Q. That is also an official document of the Veterans' Bureau?

A. It is a part of our files. Exhibit 10 is a letter signed by C. D. Hubbard, District Manager No. 10, U. S. Veterans' Bureau, by H. D. Williams. C. D. Hubbard was District Manager at the time that letter was written. As to the other party, I think

(Testimony of L. A. Lawler.)

that is Dr. Williams; I don't know what his initials are. Dr. Williams is an official of the Veterans' Bureau.

Q. That is Harry L. Williams, instead of H. D. And Harry L. Williams is an official of the Veterans' Bureau, or was at that time?

A. Yes, sir. Exhibit 11 is a report of physical examination by Dr. W. S. Anderson; also by Dr. LeRoy Southmayd; and also one by Hugh Devalan. These doctors are not Veteran Bureau doctors of my own personal knowledge, no.

The COURT.—What is that?

A. Not of my own knowledge.

Q. Exhibit 12, will you state what that is.

Mr. MOLUMBY.—If the Court please, if it will save time, I can testify, of my own knowledge to two of those doctors, and I think one of the doctors here can swear to them.

A. This is a report of Dr. R. A. Thornley, dated October 5, 1921. He is an [124] official of the Veterans' Bureau and is chief of the neuro-psychiatry section and was at the time that was made. Exhibit 13 are medical reports by Dr. T. B. Nather; report by Dr. George E. Price; indorsement by Dr. W. R. Leahy, Acting Assistant Surgeon; and C. F. Fiege, Adjustant Inspector. I don't know whether they are examining doctors of the U. S. Veterans' Bureau or officials of the Veterans' Bureau.

Q. You know regarding Dr. Price, who was subpoenaed, do you, as a witness in this case?

(Testimony of L. A. Lawler.)

A. I know he was a witness; I don't know if he was an official of the bureau. Exhibit 14 is a rating sheet by the Board of Appeals. The last rating sheet, rating that was made by the Board of Appeals, made for the purpose of compensation. Exhibit 15 is an unsigned copy of a rating made on a medical form, unsigned, dated November 9, 1921. It is a part of the file kept by the United States Veterans' Bureau in regard to McGovern's case.

Q. And one of the ratings which was controlling at the time it was made?

A. It is a copy of a rating. The same is true of Exhibit 16. Exhibit 17 is a memorandum signed by the General Counsel of the Veterans' Bureau and dictated by myself, by L. A. Lawler, addressed to the Board of Appeals, making inquiry as to the rating McGovern was entitled to on the evidence on file.

Cross-examination by Mr. HIGGINS.

With reference to the ratings in those certified copies of various documents from the Bureau of War Risk Insurance, all those ratings were made for the purpose of determining the amount of compensation.

Q. And not for determination of any liability under a war risk contract?

A. No, except that they would be used for insurance purposes if any evidence had been produced to show a total disability according to the medical rating schedule.

Q. In addition to the ratings shown in most of

(Testimony of L. A. Lawler.)

those exhibits, a consideration would be given also to the provisions of Exhibit No. 5, being the Medical rating Schedule approved July 15, 1921, before any official rating would be made for a liability on an insurance contract? [125]

A. Yes, only the Board of Appeals can rate a case for insurance; anyone in the medical division may make a rating for the purpose of compensation; and even though a rating for compensation may be permanent and total, that rating would not become final for insurance until its consideration had been given by the proper board to the medical rating schedule approved July 5, 1921. In other words, there is a difference between compensation and insurance. A permanent and total rating under compensation is based on different grounds and for different reasons, in some respects, than rating of permanent and total disability under insurance. The same evidence might be used for insurance purposes as for compensation purposes, but it would never be considered as an insurance award unless a permanent total rating could be made up of data at the time when his insurance was in force.

Q. What I mean is, in addition to the considerations given to a permanent and total rating for compensation, consideration also must be given to the regulations under the medical rating schedule?

A. Yes.

Q. And what constitutes permanent and total disability in certain cases or certain indispositions is provided for by the medical rating schedule?

(Testimony of L. A. Lawler.)

A. Yes.

Q. And unless the disability of an insured person, under War Risk Insurance, comes within the provisions of the Medical Rating Schedule, there cannot be a rating of permanent and total disability?

A. No, that is in fact a regulation of the bureau.

Q. So that, in other words, a rating of permanent and total disability, given for compensation purposes is not final so far as rating of permanent and total disability is concerned as applying to War Risk Insurance?

A. It might be; if it is made by the Board of Appeals it would be for both purposes.

Q. But the matter, as we have it before us here, with reference to these exhibits, where the rating has not been made by the Board of Appeals?

A. One of them was, the last rating. [126]

Q. Then that was made for compensation and not for insurance?

A. Yes, because there was no insurance question before the bureau; that rating is made effective as of October, 1922; plaintiff had no insurance in force after August 31, 1919, so in making that rating no consideration was given to the insurance question at all.

Redirect Examination by Mr. MOLUMBY.

It is not a fact that before an insured can draw his insurance for total disability he must be rated totally and permanently disabled for compensation. Insurance can be drawn without drawing any com-

(Testimony of L. A. Lawler.)

pensation. It has been done several times. Several men are drawing it now. Drawing insurance without compensation and *vice versa.*

Q. However, in the case at hand, if he were shown by the evidence in the files for the purpose of compensation to be totally and permanently disabled ever since his insurance lapsed, or from the time his insurance did lapse till the present date, that evidence would be used by the bureau to determine whether or not he was totally and permanently disabled for insurance purposes, would it not?

A. Yes.

Q. And can be used? A. Yes.

Recross-examination by Mr. HIGGINS.

Q. Another question: Let me ask you, Mr. Lawler, did not the rules and regulations of the Department previously provide that in case of hospitalization for a period of six months, at the expiration of that time the patient was disabled he would automatically get a permanent and total disability rating regardless of whether or not he was permanently and totally disabled in fact? A. Yes.

Mr. MOLUMBY.—We object; that has nothing to do with any of these exhibits. That rule is not put into effect with any of these exhibits.

The COURT.—You are asking if there is such a rule and regulation?

Mr. HIGGINS.—Yes. I thinks the courts take judicial notice of regulations. [127]

The COURT.—You ought to be able to produce it, if there is.

(Testimony of Dr. George E. Price.)

Mr. MOLUMBY.—We want something better than the recollection of the witness, because it is easy to produce it; not that we doubt the witness' word at all, but there is always a chance for mistakes.

The COURT.—It can stand in the record for what, to use a common expression, it may be worth.

TESTIMONY OF DR. GEORGE E. PRICE, FOR PLAINTIFF.

Thereupon Dr. GEORGE E. PRICE, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. MOLUMBY.

I am the Dr. George E. Price who made this report. I do not know Drs. H. O. Downey or Fiege. I do know Dr. Nather. Dr. Nather, on May 13, 1920, was not an examining doctor of the Veterans' Bureau but of the Public Health Service which preceded the Bureau. That is also true of myself. The number of that exhibit is 13.

Mr. MOLUMBY.—I can swear in regard to Dr. LeRoy Southmayd who signed the medical report in Exhibit No. 11, that he was at that time, and still now is, an examining doctor of the Veterans' Bureau.

NOTE:—** Upon explanation by counsel for plaintiff that certain witnesses for plaintiff were not present, it was agreed that testimony would be introduced in behalf of defendant and plaintiff's absent witnesses could testify later.

Mr. HIGGINS.—In view of the situation, may it please the Court, we would like to put in our testimony conditional that if after all of the proof is put in on behalf of the plaintiff, we may have the right to move for dismissal.

The COURT.—If you move, what value is it? Give me one single reason why a motion to dismiss at end of plaintiff's case will avail you anything that you do not get at the conclusion of the trial.

Mr. HIGGINS.—We simply want to keep the record straight. [128]

The COURT.—The record is supposed to serve a purpose. If you can tell me any purpose it will serve—

Mr. HIGGINS.—I have found authority that where you omit to make motion for dismissal at the proper time, it is deemed waived, and if you do make it and it is overruled you protect what rights you have under the motion.

The COURT.—Don't you get the same thing at the end of a case by decision? Do you mean to tell me if you make a motion to dismiss and at the end of the whole case the decision goes to the plaintiff a motion to dismiss helps you any?

Mr. HIGGINS.—If the Court should rule the motion to dismiss should have been made earlier.

The COURT.—Proceed.

TESTIMONY OF DR. C. E. K. VIDAL, FOR PLAINTIFF.

Thereupon Dr. C. E. K. VIDAL, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. DAVIDSON.

My name is C. E. K. Vidal. I am a physician and have been since 1891. Since April, 1919, I have been superintendent of the State Tuberculosis Sanitarium and specialized in tuberculosis. I hold such position at present, and as such, come in contact with a great many cases of tuberculosis. I have made a considerable study of that disease and am familiar with its causes, symptoms and results.

Q. In your practice, Doctor, as a tuberculosis specialist, have you had occasion to observe and study the malady or disease known as hysteria?

Mr. HIGGINS.—We object, may it please the Court, to this line of testimony, on the ground and for the reason that none such has ever been submitted before the Board at Washington to act upon, nor has the same been a basis of disagreement between the plaintiff and defendant in this action.

The COURT.—Overruled; if not competent the Court will give it no consideration. [129]

Mr. HIGGINS.—Exception.

A. I will answer the question as you gave it to me in the negative and say no.

Q. In your practice as a tuberculosis specialist, Doctor, have you come in contact with people afflicted with hysteria? A. No.

(Testimony of Dr. C. E. K. Vidal.)

Q. Would you say, Doctor, that tuberculosis might be a contributing cause to hysteria?

Mr. HIGGINS.—Objected to, not having any bearing upon the issues in this case, the question being indefinite and uncertain and not involving all the circumstances and conditions of the plaintiff in this action bearing upon his physical condition.

The COURT.—Overruled.

Mr. HIGGINS.—Exception.

A. I would consider tuberculosis a possible exciting cause of any nervous excitability, either a psycho-neurosis or a hysteria.

Q. Would you say, Doctor, that the presence of tuberculosis in a patient, accompanied by a nervous strain or nervous shock would bring about hysteria?

Mr. HIGGINS.—Objected to for reasons previously stated.

The COURT.—Overruled.

Mr. HIGGINS.—Exception.

A. I would consider that the toxin in tuberculosis a possible exciting cause of a nervous upset in either of the three classes already referred to.

Q. Is it possible, Doctor, for a nervous shock accompanied by tuberculosis to bring about hysteria in a case where the absence of tuberculosis might not have any effect?

Mr. HIGGINS.—We object; no foundation for the testimony; no testimony along that line in this action.

The COURT.—Oh, anything is possible; we don't

(Testimony of Dr. C. E. K. Vidal.)

proceed and try and determine causes on bare possibilities. Objection sustained to that question.

Q. Doctor, did you hear the testimony of the witnesses this morning describing the symptoms of the plaintiff in this case? [130]

A. Only fragmentary parts of it. My hearing is a little off and I didn't hear it accurately.

Q. Doctor, if those witnesses have testified, and the doctors have corroborated their testimony by saying that this man has been suffering from hysteria and hysterical fits, would you say that the worry over being told that he was a tubercular patient might bring about a hysterical frame of mind?

Mr. HIGGINS.—We object, the question is not accurately premised.

The COURT.—Have you finished your question?

Mr. DAVIDSON.—I have.

The COURT.—There is not much for the Doctor to pass on; he may; overruled.

Mr. HIGGINS.—Exception.

A. Your Honor, I can only answer that in a general way. I cannot answer in regard to a specific case.

The COURT.—Very well.

A. I would say, that given an excitable individual, burdened possibly by a bad head, the nervous toxin might be an exciting cause as to whether or not he would remain a normal individual.

Q. Would the worry over having tuberculosis sometimes be a contributing cause towards hysteria?

(Testimony of Dr. C. E. K. Vidal.)

Mr. HIGGINS.—We object upon the grounds previously stated.

The COURT.—Overruled.

Mr. HIGGINS.—Exception.

A. In an excitable individual.

Q. Doctor, would you say that a man suffering from tuberculosis and having from one to fifteen hysterical fits a day, was totally and permanently disabled? A. No.

Q. Is the presence of tubercular germs in the sputum necessary to determine whether or not a man has tuberculosis, Doctor? A. No. [131]

Cross-examination by Mr. HIGGINS.

Q. Suppose, Doctor, that this plaintiff were examined to-day, having been sent to an expert on tuberculosis with the supposition that he had tuberculosis and was informed by that expert that he had no tuberculosis, would that information given to this plaintiff be an exciting cause to produce an hysterical outburst on the part of this plaintiff a few days later?

A. It would depend entirely upon the personality of the plaintiff.

Q. But if you say that tuberculosis is an inciting cause and you informed the patient he has no inciting cause, the inciting cause is removed, isn't it?

A. Yes. I have heard of "pension" and "compensation neurosis." That is a recognized condition in medicine.

Q. And that is a condition particularly the

(Testimony of Dr. C. E. K. Vidal.)

compensation neurosis, that has become quite prevalent since the last war, or would your experience as a physician permit you to know about that?

A. My experience has not been extensive enough to warrant replying to the question.

Mr. MOLUMBY.—The only other witness is the plaintiff and the doctor who has not yet arrived from Minneapolis.

The COURT.—How comes it this doctor did not get here?

Mr. MOLUMBY.—I can't say, your Honor, unless it is the floods reported in South Dakota. I had a wire from him day before yesterday that he would be able to be here this morning, and then another wire on board train that he wouldn't be able to make it before to-morrow morning.

IT IS HEREBY STIPULATED AND AGREED by and between the plaintiff, Herbert H. McGovern, Jr., through his counsel of record, and the United States of America, through Ronald Higgins, Assistant United States Attorney for the District of Montana, that the deposition of Major W. S. Bentley may be taken before Dudley Crowther, a Notary Public for the State of Montana, and that the same may be used as part of the testimony on behalf of the plaintiff in the above-entitled action. [132]

DEPOSITION OF MAJOR W. S. BENTLEY, FOR PLAINTIFF.

Taken before Dudley Crowther, notary jublic for the State of Montana, at Great Falls, Montana, on June 30, 1923.

W. S. BENTLEY, sworn as a witness on behalf of the plaintiff, in answer to the questions put to him testified as follows:

Direct Examination by Mr. MOLUMBY.

My name is W. S. Bentley. My present headquarters is Sioux Falls, South Dakota. I am a physician and surgeon and have practiced thirty years. My official title is Surgeon, Reserve United States Public Health, Detailed for Duty with the United States Veterans' Bureau. Detailed at present at the headquarters of District No. 10, Minneapolis, Minnesota, stationed now at Sioux Falls, South Dakota. In the fall of 1920, I was in the District Office at Minneapolis, and on February 1, 1921, I reported for duty to the Commanding Officer at Asbury Hospital, Minneapolis, Minnesota. I am acquainted with the plaintiff, Herbert McGovern. First met him either the first or second week in February, 1921. From the first part of February until the last of May, 1921, I saw him four or five times a day. He was a patient in my hospital and in going to my room I had to pass by his, and the door was a good deal open and I saw him there. I saw him two or three times in June, 1921. I saw him in either the last days of April or the first

(Deposition of Major W. S. Bentley.)

days of May, 1923, here in Great Falls, and again to-day. As the admitting and discharging officer at Asbury Hospital, I saw all patients when they came in and when they went out, and any one that was of particular interest, I would keep tab on him while he was in the hospital. That was true of McGovern's case.

Q. State just what physical and mental condition you observed in McGovern while at the Asbury Hospital?

Mr. HIGGINS.—Objected to on the ground that it is incompetent and immaterial, being based upon condition of plaintiff subsequent to the 31st day of August, 1919, and at a time when insurance of plaintiff had lapsed; also that it is not shown that the facts about to be testified to by this witness have been [133] submitted to the United States Veterans' Bureau for consideration by them and does not constitute the basis of a disagreement between the Bureau and the plaintiff; also that this witness is not qualified to pass upon the physical condition of plaintiff as alleged in his complaint.

Mr. MOLUMBY.—It is agreed by counsel for plaintiff that the Government may have an objection of the above character to any and all evidence in this deposition submitted.

A. He quite frequently had nervous spells of hysteria. I saw him at all times of the day and night as well, for the reason I had to go by his room. There was considerable talk among the nurses that he was faking and putting on and

(Deposition of Major W. S. Bentley.)

in order to determine, in my own mind, whether that was true or not so I could report the matter to the Commanding Officer who had asked me to observe, for the reason it was a question or not whether they were going to discharge him from the hospital, and on the information I gave him he was not discharged from the hospital. I secured this information by personal contact and personal observation. In regard to these spells, I would notice in passing his room that he would be crying or shaking, sometimes he would be unconscious for a short time and I noticed it at night just the same as in the day-time. I observed him alone many times; took particular pains to watch him when he absolutely knew there was nobody around, particularly myself; this, through a crack in the door; he did not know of my presence; there was nobody else in the room with him. I saw him go into a spell this afternoon. I went down to the place where he lives. We were talking just the same as we are talking now. He was lying on a sofa and all at once, right in the middle of a sentence, he rolled off on the floor and I threw out my foot quick to keep his head from hitting against the table leg and during the hour and a half that I was there, he had three of these spells and one of those spells was brought about by a youngster out on the sidewalk exploding a loud firecracker, and he—just like that, and tumbled over. He just kind of gasped a deep breath and sort of threw up his arms and fell back. These

(Deposition of Major W. S. Bentley.)

spells that he had this afternoon would last from a minute and a half to, I should judge, two minutes, and he came out as if [134] nothing had happened and began talking just as rationally. It didn't seem to have any ill effect upon him, no acceleration of his pulse. I felt his pulse to see whether there was anything abnormal about him, the same as I used to do down in Asbury.

Q. In coming out of these fits, Major, could he or could he not recall what conversation had been going on? How was his mind with reference to whether it was clear or not when he came out?

A. Well, apparently he would go right on, you might say where he left off. I know he did to-day and I recall on other occasions.

Q. Major, what can you say with reference to the condition he is in now and on the occasions of your former observation of him a year or so ago and while he was in the Asbury Hospital?

A. I think he had more frequent spells, from the two occasions that I have seen him in the last few months. I cannot answer the question how many spells he had a day while a patient at Asbury Hospital, for he might have had many in the hospital that I didn't see. I never observed him while he was in Asbury Hospital having more than one fit at a time. I never saw a succession, one after the other, like I did to-day. I wouldn't say that he had one a day at Asbury Hospital but I would say that he had three or four a week, that I observed. Something of an emotional nature

(Deposition of Major W. S. Bentley.)

or shock of news or anything that would tend to excite, or something of joy, usually brought on these spells.

Q. Major, from your own observation in taking care of plaintiff while he was a patient at Asbury Hospital, what was his mental attitude toward his own disability?

Mr. HIGGINS.—Objected to, as the mental attitude of the plaintiff would not be determinative of any issues in this case.

A. He worried a great deal to himself; he talked more about getting well and getting back on the job again, as a mining engineer, and often he used this expression: "To hell with compensation; let me get back on the job again and I will earn several times what the compensation will amount to." He used that expression many times. Regarding my experience to observe mental cases, I was [135] surgeon in charge of the South Dakota Soldiers' Home Hospital for three years and we had quite a good many mental cases there; I was a member of the Insanity Board for ten years and sat on those cases; during the nine months in Asbury Hospital I used to have a good deal of those mental cases for the reason that I had an adaptability for handling the men and could get them to do things that the other officers could not. I transferred a number of patients to the Mental Hospital at Marion, Indiana, for the reason that they thought I could handle those cases better than others.

(Deposition of Major W. S. Bentley.)

Q. Major, in your opinion, what is the disability that the plaintiff has?

Mr. HIGGINS.—We object, first, on the ground that the witness has not proved himself an expert, not qualified to answer; secondly, the question is too general, indefinite and ambiguous, and not phrased in such a fashion to be determinative of the issues in this case.

A. Why at the present time he has a hysteria. He has been troubled with this hysteria since my first observation of him in Asbury Hospital. As to whether or not plaintiff is faking these hysterical fits, as I stated before, I particularly went into that question, not only for my own satisfaction but as I was requested to do by the Commanding Officer of the institution of which I was an officer and I am satisfied he was not faking in any shape, manner or form.

Q. Major, what is your opinion as to whether or not the plaintiff is totally and permanently disabled?

Mr. HIGGINS.—We object, on the ground that the question is not properly phrased, the issues here being whether or not the plaintiff is permanently and totally disabled from continuously carrying on any substantial, gainful occupation and the probability that it will so continue throughout life.

A. He has been ever since I have known him and is wholly unable to do any work in a gainful way whereby he can make a living at the present

(Deposition of Major W. S. Bentley.)

time, the same as he was two years ago, and I see no hopes at this time where he is getting any better.

Q. What is your opinion, Major, as to whether or not the plaintiff is now or has been since you first observed, able to follow a substantially gainful occupation? [136]

Mr. HIGGINS.—Objected to, on the grounds stated to the previous question.

A. He has not been.

Q. What is your opinion, Major, as to whether or not it is reasonable to suppose that this inability to follow a substantial gainful occupation will exist in the future throughout his lifetime.

Mr. HIGGINS.—Objected to, upon the grounds heretofore interposed to the questions propounded to this witness, and on the further ground that the question is suppositious.

A. From observation in the past, of men of his age, the majority have not recovered sufficiently to pursue a gainful occupation. I would think this would be true in his case. I have become familiar with what is known as compensationitis or compensation hysteria. I have formed the opinion that plaintiff is not suffering from this disease or ailment. This, for several reasons: First, the getting his compensation has been his least trouble. As I stated before, he did not care anything about compensation. All he wanted to do was to get well where he could go back on the job and get

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work; and when people would offer him money he would absolutely refuse to take it and make the same remarks: "I don't want money; I am no pauper; I want to get well and get to work."

Q. Has there been anything in your observation of McGovern which would show you the extent of his will-power, Major? A. Yes, sir.

Q. Will you state what that was?

Mr. HIGGINS.—We object, on the grounds that the examination of this witness shows that it isn't being endeavored to be demonstrated that the plaintiff is suffering from any mental disorder. Any questioning along this line would be incompetent, irrelevant and immaterial and outside of the issues in this case.

A. Why, the nurse used to place a sedative on his stand and he was directed to take it and he refused and wouldn't take it, and I frequently—he has called me in and he would say; "Major, there is some verinol a nurse would ask me to [137] take and I refused. I don't want to take it because I don't want to be a dope fiend," and when I would go out in the morning he would be watching and say, "It is still there," and I would go in many a time and find that to be true. Verinol is a habit-forming drug.

Q. Do you know whether or not McGovern had previously been addicted to the use of verinol or other drugs. A. I had.

Q. Do you know where he acquired that habit?

Mr. HIGGINS.—That is objected to, nothing in

(Deposition of Major W. S. Bentley.)

the pleadings alleging that this plaintiff has been disabled by the use of drugs or that the Government in any way contributed to any habit of that kind that he may have formed, and any answer to this question would bring up matters outside the issues in this case.

A. McGovern told me on numerous occasions that he had been given drugs in other Government hospitals and he said that he did not propose to take any more, and on one occasion he was reported as obstructing medical treatment, and when the matter was investigated it was found that he had refused to take verinol and the nurse had reported.

Mr. HIGGINS.—It is moved that the answer be stricken on the ground that it is hearsay and purely self-serving.

Q. Major, in your experience as a physician and surgeon, and in your experience with mental diseases and hysteria cases, such as this, what can you say as to the probability of tuberculosis being a contributory cause to hysteria?

Mr. HIGGINS.—Objected to, as the witness has not qualified himself as a tuberculosis specialist, nor has he testified that he made any examination of the plaintiff to determine whether or not plaintiff had ever, or is now, or at any time, suffered from tuberculosis.

A. Why, from my observation of tuberculosis, which I have seen many of them, both in private practice and while I was in the state service and the Government service, a great many of those

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tubercular patients become hysterical, caused from fretting so much about their condition, and one of the medical authorities, [138] which is a standard work, "George and Peterson," makes a plain statement that phthisis is another synonym for tuberculosis as a cause of hysteria. I have never examined McGovern to discover if he was or had been suffering from tuberculosis.

Q. Doctor, in any of the hysteria spells or fits which you have observed the plaintiff in, did he, while unconscious, ever talk of anything in his past experience?

Mr. HIGGINS.—That is objected to on the ground that it is suggestive and leading and prompting,—the witness heretofore having testified to all the characteristics of these fits.

A. He did.

Q. State what he had to say on such occasions.

A. He stated that while he was in the United States service on a sub-chaser that the shock that he received there that he had never gotten over it and he never was the same, his nerves were all shattered.

Mr. HIGGINS.—It is moved now that the answer be stricken as not responsive to the question and embodies only a self-serving declaration.

A. In these fits and while unconscious, he would talk as though he was back to the days when he was in the service.

Q. What did he talk about and say?

Mr. HIGGINS.—Objected to as being incompetent, irrelevant and immaterial.

(Deposition of Major W. S. Bentley.)

A. The severe shock received while on the sub-chasers.

Mr. HIGGINS.—It is moved that the answer be stricken as being ambiguous and not responsive.

Q. Just what do you mean "the severe shock he received"?

Mr. HIGGINS.—We object, nothing in the answer of the witness to indicate more than he has stated. Any further answer would be purely conjectural.

Q. What I am getting at, Major, whether he talked about anything back in the service? [139]

A. He just simply spoke of when he was in those sub-chasers that he would get very nervous and sometimes get sick at his stomach and shake all over.

Mr. HIGGINS.—Move to strike that out as not responsive to the question.

Q. I will ask you, Major, whether or not, from your experience as a physician and surgeon it is customary or likely for one suffering from hysteria fits to revert back to the cause of his hysteria while in one of those fits, in his conversations or actions?

Mr. HIGGINS.—Objected to as being incompetent, irrelevant and immaterial, having no specific bearing on this case, being too general in its terms,

A. Yes, it is often the case.

Q. In your observation of McGovern, Major, did he ever, while having one of those fits, relate to any particular event that you observed?

Mr. HIGGINS.—Objected to as incompetent,

(Deposition of Major W. S. Bentley.)

irrelevant and immaterial, having no bearing on any of the issues in this case? A. Yes.

Q. What particular event did he relate, if any?

Mr. HIGGINS.—Objected to on the same grounds.

A. Why, while on duty on the sub-chasers that he would get nervous and excited and sick.

Q. Major, does toxic poisoning, in your opinion, which results from tuberculosis, in any way effect the nervous system?

Mr. HIGGINS.—We object on the ground that it is incompetent, irrelevant and immaterial, being repetitious, the same matter having been inquired of previously. A. Yes.

Q. In your opinion will a nervous shock or nervous strain cause hysteria such as you have testified the plaintiff here has?

Mr. HIGGINS.—That is objected to because no ground or foundation has been laid upon which to premise any such question, it not having been proved that the plaintiff ever did suffer from any shock from any cause, particularly not in the service of the United States. A. Yes. [140]

Q. Assuming, Doctor, that a man is informed by physicians and doctors that he has tuberculosis, whether he has or has not that disease, is it possible that the brooding on that subject would, in itself, cause hysteria of such a type as you have testified the plaintiff has?

Mr. HIGGINS.—That is objected to on the ground and for the reason it has not been shown

(Deposition of Major W. S. Bentley.)

anywhere in the testimony of any witness in this case that the plaintiff was brooding or so thinking, but, on the contrary, the plaintiff was insistent that he was suffering from some disorder when informed on the contrary that he was not.

A. Yes.

Cross-examination by Mr. HIGGINS.

I am not a neuro-psychiatrist.

Q. You are just what is known as a plain everyday physician and surgeon?

A. Yes. I qualify with saying that I have had the experience that I have stated, with training along the lines of which I spoke, the experience. I think that compensation hysteria or pensionitis or compensationitis is a recognized condition in medicine. It has been a condition particularly recognized since the war. It might be comparable to a condition known as railway spine.

Q. And when a person is suffering from compensation hysteria, that is curable, is it not, by removing the cause of the hysteria?

A. If it is compensation hysteria, yes, but if it isn't, no. They may be mistaken in the diagnosis.

Q. But if the diagnosis is correct in that it is compensationitis or compensation hysteria, it is curable? A. In many cases, yes.

Q. In all cases, isn't it?

A. Well, I wouldn't say that it was in all cases.

Q. But in practically all cases?

A. I have known of a good many cases that have been diagnosed as compensation hysteria and they

(Deposition of Major W. S. Bentley.)

have gotten their compensation and they were no better than they were before. [141]

Q. You do not agree then, Doctor, with the testimony of the neuro-psychiatrists in this case when they say that when the cause of compensation hysteria is removed that the one suffering begins to show an improvement and eventually recovers?

Mr. DAVIDSON.—To which question plaintiff objects on the ground and for the reason that it is not shown that this witness has any knowledge of such testimony being introduced in this case and that the question presupposes such a knowledge of testimony on the part of the witness.

A. I based my opinion—

Q. Will you answer the question, please?

A. That is what I am going to do.

Q. Without making a stump speech of it.

A. No, I am not going to make a stump speech, but I will answer it in my own way or else won't answer it at all. I base my opinion from personal contact and observation of men whose records have been diagnosed as compensation hysteria and award of compensation having been made and no improvement whatever was made in the complaint.

Q. You mean that you do or do not agree with these neuro-psychiatrists who have testified in this case?

Mr. DAVIDSON.—To which plaintiff objects on the ground and for the reason that it is not shown that the plaintiff has any knowledge of the

(Deposition of Major W. S. Bentley.)

testimony which was submitted in this case by any neuro-psychiatrists on which this question is based.

A. I base my opinion on the evidence given in each case that I have come in contact with.

Mr. HIGGINS.—It is moved that the answer to this last question and to the previous question be stricken as not responsive and evasive.

Q. Have you ever discussed the matter of the condition of this plaintiff with Dr. Michaels?

A. Not for about two years. I have never discussed it with Dr. Josewich. I was the admitting and discharging officer and had charge of the help patient clinic in the Asbury Hospital. Dr. Michaels was the neuro-psychiatrist and Dr. [142] Josewich held the position of T. B. in that hospital. I never did give this plaintiff a physical examination. There was no record made of what I have testified to in this deposition, nor was any such sent by me to the Bureau of War Risk Insurance of the United States Veterans' Bureau.

Q. Doctor, if a case of compensation hysteria is correctly diagnosed, isn't that case curable?

Mr. DAVIDSON.—Objected to on the ground and for the reason that the question is merely a repetition, having been previously answered by the witness.

Mr. HIGGINS.—This is cross-examination.

A. Not in all cases.

Q. In other words then, Doctor, you do not agree with the neuro-psychiatrists that have testified in this case, if they have testified that such cases are curable?

(Deposition of Major W. S. Bentley.)

A. I will say the same as I did before that you have got to base your information on each individual case; the case by itself, and not on any general statement. The nurses at Asbury Hospital reported to the Commanding Officer in charge and also to me, their opinion that plaintiff, while there as a patient, was faking when going into these fits. I don't know whether or not this opinion of the nurses was reported to the neuro-psychiatrists of the hospital.

Q. Wouldn't they be the proper ones to report a matter of that kind, coming within their specialty? A. It might and it might not.

Q. Why might it not?

A. For the reason he probably saw the man once a week and I saw him several times a day.

Q. You don't think then, that that should have been reported to the neuro-psychiatrist so that he could pass upon the matter, a matter embodying his specialty?

A. I will answer that in this way, that the man that has the facilities of observing a man several times a day certainly can form a better opinion than a man who sees him once a week. [143]

Q. You think then, Doctor, that your opinion in this matter is superior to that of the neuro-psychiatrist? A. I didn't say so.

Q. Then you don't think it is superior?

A. I didn't say that.

Q. What did you say about it?

A. I just answered the question.

(Deposition of Major W. S. Bentley.)

Q. Now, in your diagnosis of plaintiff's condition and particularly with relation to its permanency, you say that you base your opinion largely because he has made the remark about "to hell with compensation," or words to that effect, and that he would like to get on his feet and get back to work as a mining engineer?

A. Yes, for the reason that these men that have been correctly diagnosed as compensation hysterias are always talking about the compensation, and he never was. I do not know what plaintiff said about compensation to the neuro-psychiatrists who examined him.

Q. And supposing, Doctor, that in his conversation with the neuro-psychiatrists, he emphasized the fact that he was in debt and couldn't get out of debt without the assistance of compensation and that to them his dominant desire seemed to be to get compensation, what then would be your opinion?

A. He never made any such remark as that to me.

Q. I know he didn't make it to you, but I am asking you a question basing it upon what he may have said or did say to others.

A. I would form my opinion on what he told me and not on what he told others.

Q. In other words then, Doctor, you do not desire to answer the question?

A. Why, I am not trying to evade the question in any way.

(Deposition of Major W. S. Bentley.)

Q. Would you alter, Doctor, your opinion in this case if you knew that plaintiff in his remarks to a neuro-psychiatrist and to at least one other doctor that examined him, stated that he was in debt and needed money badly and had to have compensation, and in their opinion, his main desire seemed to be to get compensation, [144] and further, that he said recently, that is, the day after this hearing before Judge Bourquin, that he would die unless he got compensation?

Mr. DAVIDSON.—To which question plaintiff objects on the ground and for the reason that it is not a question founded upon any testimony of record in this case and is asking the witness for an opinion on a supposition of facts not founded upon the evidence in this case, and for the further reason that the question is ambiguous and unintelligible.

A. In this particular case I wouldn't change my opinion.

Q. Would you change your opinion, Doctor, if it were true that when this plaintiff was examined by Dr. Josewich for tuberculosis and was informed by Josewich that he did not have tuberculosis, and three days thereafter this plaintiff exhibited signs of hysteria and was then turned over to a neuro-psychiatrist?

A. No. I wouldn't change my opinion in this case, no.

Q. In other words then, that would not give you the impression, when the plaintiff was informed by the tuberculosis specialist, as he was, that he did

(Deposition of Major W. S. Bentley.)

not have tuberculosis, that he then, in his desire to get compensation became hysterical?

Mr. DAVIDSON.—That question is objected to on the ground that it is ambiguous and unintelligible.

A. The damage to his nervous system was done long before Josewich made his examination and found his case was arrested.

Mr. HIGGINS.—We move that the answer be stricken as being evasive and not responsive and not based upon the facts in the case.

A. Plaintiff is suffering with hysteria. Hysteria is not psychosis, but it is a mental condition. Hysteria is a nervous condition. Plaintiff was discharged from Asbury Hospital at his own request.

Q. Then his reason was not affected?

A. I don't quite get at the meaning of that. He wasn't insane, no, if that is what you mean by reason. I am familiar with the rating schedule adopted by the United States Veterans' Bureau. As to what is the highest rating that can be given for hysteria, I would refer you to the rating table. I am not permitted to [145] state that out in an unofficial way. I would not be surprised to learn that the highest rating would be total temporary, rather than total permanent. There are lots of these cases that have a sliding scale. I wouldn't say that I know that hysteria is never rated as permanent and total disability by this schedule rating. As to plaintiff's rating while in Asbury Hospital, it wasn't the sphere of any man in As-

(Deposition of Major W. S. Bentley.)

bury Hospital to rate any man, he was rated by the rating section.

Q. Was he diagnosed by any doctor, as hysterical, in that hospital?

A. I don't know if it was put on his record or not. I never paid any attention to his rating.

Q. Isn't it the duty, Doctor, of the examining physician in the hospital, to call to the attention of the central office any disability of total degree which may be rated as permanent and total under the rating schedule?

A. Now, I cannot very well answer that by yes or no, but I could tell you what I know about it.

Q. You either know or you don't know, Doctor.

A. You cannot always answer everything by yes or no.

Q. This is one time that you can.

A. I was not the medical officer in charge of Asbury Hospital and was not consulted about such cases. I presume that I read the hospital or clinical record of plaintiff at the time of his discharge from the Asbury Hospital, but I don't recall what it was at this time.

Q. Did you notice any notation thereon of permanent and total disability?

A. I don't recall whether it was on there or not. I was discharging a number of cases every day and that is something that I wasn't concerned in and I did not notice it.

Q. Did you know that McGovern gives his earning capacity as a mining engineer at $100.00 a month prior to the time he entered the services?

(Deposition of Major W. S. Bentley.)

Mr. MOLUMBY.—I interpose an objection to that as not having been in evidence. The fact of the matter is the statement, which he said was in the year preceding his entry into the navy, he averaged $100.00 a month for that year. It does not state that he worked every month for $100.00 a month. [146]

Q. Accepting the correction of counsel for the statement, would you say that you knew or did not know that, Doctor?

A. I never knew what he got. I don't think plaintiff got any compensation while he was hospitalized at Asbury Hospital. The compensation rate for total temporary is $80.00 a month. It is customary for the bureau to pay temporary total disability to a man hospitalized for compensable disability, but they don't do it in all cases.

Q. Do you know any cases where they don't do it without violating the rules and regulations of the bureau?

A. There was a whole lot of them in Asbury Hospital while I was there that were not getting their $80.00 a month. Eighty dollars is total temporary disability compensation. It is what they call hospital pay.

Q. And the patient gets free room, free medical treatment, free meals, and if McGovern only made $100.00 a month before he went into the service and he got $80.00 a month and free room and board in the hospital he was getting more than he got, at least on an average, before he went into the service?

(Deposition of Major W. S. Bentley.)

Mr. MOLUMBY.—Objected to on the ground that it is assuming a fact that is not in evidence and stating the fact regarding the pay that he did get before entering the navy, and is not proper cross.

A. I will answer that question in this way, that the records in Washington will show what he got while he was in the hospital.

Q. Well, if he got that $80.00 a month and free board and room, it would be rather peculiar, wouldn't it, for him to really want to get out so as to get back to work and earn money, as you testified?

Mr. MOLUMBY.—Objected to as being too speculative and too immaterial and irrelevant in this case; not proper cross-examination for that reason.

A. I didn't prescribe it, I could not say how much verinol was ordered for McGovern to take.

Q. You were interested in his case, you stepped in to see him. A. I certainly did, yes. [147]

Q. And you never asked him, when they told him they wanted him to take verinol?

A. It was not my business.

Q. You were investigating for the Bureau the condition that the patient was in?

A. I wasn't investigating for the Bureau, I was investigating for the Commanding Officer of the Hospital. I certainly did not ascertain how much verinol he was required to take. His doctor in charge prescribed a dose for him and it was none of my business and I wouldn't pry into it. It was not a matter where I was investigating a dose at

(Deposition of Major W. S. Bentley.)

all. I stated so, and McGovern did tell me he had taken verinol previously. That was at—I have forgotten the name of the institution, but it was just across the way—Minneapolis Sanitarium.

Q. Do you think that had anything to do with his hysteria? A. Certainly would aggravate it.

Q. That was about two months before you say he got that; when did he get this other verinol?

A. Why, he came right from the Minneapolis Sanitarium, right to the Asbury.

Q. And how long before?

A. He was just fetched across the street and fetched in the Asbury Hospital. I don't know how long he had been in the Minneapolis Sanitarium. I haven't the least idea. In fact, I never knew anything about what hospitals he had been in except that one prior to his coming to Asbury. Oh, no, he was not in that hospital since his discharge. I said that tuberculosis would be a contributing factor to hysteria, and George & Peterson says so too. It might be active or inactive tuberculosis.

Q. Now, as a matter of fact, Doctor, isn't hysteria a contributing factor to a tubercular condition, rather than a tubercular condition being a contributing factor to hysteria? A. Not exactly, no.

Q. Hysteria would have a tendency to weaken the resistance of the afflicted person to the encroachment of tuberculosis, wouldn't it?

A. Why, it might. [148]

Q. In fact, it would, wouldn't it, if the afflicted person had a tendency to tuberculosis?

(Deposition of Major W. S. Bentley.)

A. The usual case, if a person gets tuberculosis and gets worrying about it, he gets hysteria.

Q. Accepting your statement, Doctor, which is not responsive to the question if the tubercular condition is removed the hysteria ought to improve?

A. Not in all cases.

Q. What would you say, in most or in least?

A. In lots of cases they remain hysterical.

Q. In other words, you don't want to answer the question, Doctor?

A. No, not necessarily, I don't say that at all.

Q. How much does McGovern weigh at the present time? A. I didn't weigh him.

Q. He weighs over two hundred pounds, doesn't he? A. I don't know; I wouldn't say.

Q. He is as large a man as I am, isn't he? In fact, taller than I am, isn't he?

A. I wouldn't say; I judge he is about as large as you.

Q. Giving my weight as about two hundred and six pounds, Doctor, would you say that McGovern weighs that much?

A. Sometimes a person's flesh is very flabby and looks to weigh quite a bit and it is soft and so on. I don't know what he weighed in Asbury Hospital. I don't recall whether he was of the same size then as he is now.

Q. Are you familiar, Doctor, with the rating schedules of other nations besides the United States?

Mr. MOLUMBY.—That is objected to as abso-

(Deposition of Major W. S. Bentley.)

lutely immaterial; has nothing to do with this case; improper cross-examination, not having been gone into on direct.

A. The rating schedule that was used was one that was made up by our own department, and that is what we used, and we weren't told in the rating section what other nations were using. It was made up by a committee and we were to use that.

Q. Don't you know that the basis and foundation of the rating schedule as adopted [149] by the United States was that of the rating schedules of other nations, but on the part of our country with more liberal conditions?

Mr. MOLUMBY.—Objected to for the same reason it has nothing to do with this case. The man has not served in any army except the United States.

A. I have heard reports of that kind, but I don't know of my own knowledge.

Q. Do you know, Doctor, that France, one of the first nations to get into the war, has abandoned the giving of compensation to those afflicted with hysteria and no longer recognize that as a compensable malady?

Mr. MOLUMBY.—Objected to for the same reason; not properly qualified, and maybe because France hasn't got the money to pay them and maybe a thousand other reasons; not a proper question and not proper cross, and objected to on the grounds stated in the preceding question.

A. I haven't received any notice of that condition

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from Bureau reports. I try to keep up with the progress of medicine, particularly those matters concerning my particular branch of medicine.

Q. And your particular employment; and you say that you never have learned that?

A. I have never received any official communication from the Bureau to that effect.

Q. Have you ever read it anywhere else?

A. I have read it in the newspapers and some medical journals.

Redirect Examination by Mr. MOLUMBY.

Q. Doctor, in your opinion would financial worries be a contributing cause to the malady of hysteria?

Mr. HIGGINS.—That is objected to as being improper rebuttal and directly in conflict with the testimony of this witness in chief, that plaintiff was not suffering from financial worries but only with a desire to be cured and returned to work.

A. It would.

DEPOSITION OF HERBERT H. McGOVERN, JR., FOR PLAINTIFF.

Taken on the 6th day of July, 1923, at Great Falls, Montana, before P. C. Silk, a notary public for the state of Montana, by stipulation [150] between counsel that the same may be considered as part of the testimony in this action, subject to the law respecting admissibility of testimony.

(Deposition of Herbert H. McGovern, Jr.)

HERBERT HUGH McGOVERN, Jr., being called as a witness in his own behalf, and being duly sworn, testified as follows:

Direct Examination by Mr. MOLUMBY.

My name is Herbert Hugh McGovern, Jr. I am thirty-three years old. My home has been in Great Falls, Montana, for about ten months. Previous to that it was at Kalispell, Montana. I have been a resident of Montana off and on for about thirty years. I was born in Minnesota. At the time this action was started, my home was in Kalispell. Except for the time I have been in the hospital since getting out of the navy, my home has been all over the United States. I was in the naval service of the Government during the war. I enlisted the first part of June, 1917, and was discharged in October, 1918. I was located at Woodman, Colorado, at the time I was discharged. My discharge reads from Fort Lyons Sanitarium. Prior to my disharge from the navy I was hospitalized, first at New London, Connecticut and from there I was sent to Eastern Point, Connecticut. I was sent there because there was too much noise at the base hospital for me, that is a base hospital at Eastern Point. Next I went to Polytechnic, New York. I was in the hospital there. From there I was sent to Fort Lyons, Colorado, and hospitalized at the Fort Lyons hospital. They couldn't treat me as they should there and they sent me to Woodman, Colorado. That is where I was discharged from on my own request. The doctors didn't want me to. I was

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discharged from the navy at my own request before the Armistice was signed. I don't know what date I went to New London, Connecticut. Prior to that time I was on board the ship S. C. 42. That was a sub-chaser. Considerable happened on board ship to incapacitate me. I was holding two jobs. My rating was machinist first class. I was holding down chief though my rating was machinist mate first class. I had absolute charge of the engine-room and all mechanical appliances, and the dropping of depth [151] bombs, raising the stern of the boat out of the water every time they went over. The decks were leaky from the dropping of bombs and let the salt water in through the storage batteries. The combination of salt water and sulphuric acid in salt water forms a very poisonous gas. Considerable time prior to which I realized what was going on, I could not tell anything about it. I got into that gas and inhaled some of it. Yes, considerable. The doctors said the effect of it was T. B. It made me unconscious and semi-conscious. I don't know for how long. That has been a long time ago. There were other fellows in the engine-room. They were affected in the same way; Haddick, machinist mate, second class, died from it. As to whether, at that time, we were going across towards France or coming back this way I will tell you Loy, we had sealed orders all the time and I don't know where we set out, somewhere on the Atlantic. After that I was brought back to this country. There is a period there I don't know anything

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about. I don't know whether I was treated on board ship. There was no ship doctor. I was treated for T. B. at the hospital at New London, Connecticut. I was always given a private room on account of my nerves. The nerves were in such a condition I couldn't sleep and I had to have it where it was quiet. I would go to pieces. The other fellows were in the wards. After leaving these hospitals and prior to discharge I was treated for my nerves in addition to T. B. I was put in the Eastern Point Hospital for that purpose and at Fort Lyons they gave me a little bungalow all by myself, and at Woodman, Colorado, I had a room first, and then I got on my feet, and they gave me a little hut all by myself. After my discharge I had a bunch of money and I was nervous; I would get on a train and get off at a station and look around the station and then get the next train out. I was in several hospitals out of my own pocket, such as Kansas City, Missouri. It was St. Luke's. In Kansas City I had a fainting spell on the street. I woke up in jail. I explained to the officer and they took me to the hospital. I was at St Luke's about three weeks or a month and they put me on the train and shipped me to Portland, Oregon. I was not in a hospital in Portland, until some time later. I was in bed at the home of my sister. In Portland I began [152] to get disgusted with the Government doctors and I had my sister take care of me. As soon as I was discharged I put in my claim for

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compensation; that was not at Fort Lyons, but at Portland, Oregon. They wrote and asked me when I died. They seemed to have listed me as being dead at that time; they wrote back and asked me when I died. From Portland I went up to W. E. Pierce's summer home. He had fifteen hundred acres at Hot Springs and I went up there and took treatments that summer. Then I returned to Portland and from there went to Los Angeles and it was about New Years that I landed at the Soldiers' Home Hospital. It was called the National Soldiers' Home of California situated at Sawtelle; there is a postoffice there; you can reach it by the National Soldiers' Home. I was there until spring. I was sent there by the Government and was under the care of the Government; they took care of a bunch of veterans there. They listed me T. B. It didn't bother me much though there was signs of it. An X-ray showed up on the right upper lobe quite a spot; it rattled a little bit but they said it was my nerves more than anything else. I was at Sawtelle from about New Years to the last of February, 1919, or 1920, it must have been. I went down to San Diego. They said there was no fog down there and I thought I could improve better down there. I don't know the name of the hospital down there. From San Diego I returned to Portland, Oregon and was in St. Vincent's hospital for a few days under Government jurisdiction and went from there to Spokane, and woke up one morning about ten o'clock, and when I came to I

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was in Fort Wright hospital. I don't know how I happened to get into that hospital. I was under the care of the army there. I don't remember the names of the doctors who took care of me. It was the head doctor of the hospital. While there, I saw Dr. Price twice. I had a slight examination by him once and I was in the Sacred Heart, Spokane, when he examined me. They moved me in and Doctor Price examined me there, and I came over to Montana to my father's logging camp, and I got news that I was broke to twelve dollars per month. I had been receiving $80.00. I was over in Montana awhile. As soon as I received this notice I went in for vocational training. I went in to see Dr. Price but he wouldn't let me take vocational [153] training. He said my health would not permit it. Then I returned to Montana. After coming back to Montana I was put in the hospital at Kalispell for three days and never saw a doctor and they were strict there. They would not let me smoke cigarettes while there. From there I came to Great Falls and was in the Columbus Hospital. I was examined by Dr. Southmayd and he give me T. B. and nerves and said my heart was a little off. I was sent to Columbus Hospital on the request of Dr. Southmayd to be treated for T. B. I had been living where I was quiet, on the lake, and they let me out. At the hospital they took me out of the ward after I had been there for two hours and give me a private room and from there I was sent to Thomas Hospital, Minneapolis, Min-

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nesota. I had a bunch of fainting spells. They first insisted on putting me in a room or in a ward and would not let me out of bed. The nurses didn't like to take care of me, and they sent me to St. Barnabas Hospital, and I asked for a doctor and they said they wanted to give me a shot of hop and I had some fainting spells there that night and the next morning they railroaded me to the Minneapolis Sanitarium, where my mind was as good as it is to-day and four men grabbed me and put me in a strait-jacket and manacled me, and beat hell out of me. After a while I came to. While I was in Thomas Hospital and St. Barnabas Hospital I was under the care of that big T. B. doctor. I was examined by Dr. Josewich. Dr. Josewich's examinations goes against the other examinations previously. As to Dr. Josewich specialty, I never knew he specialized in much of anything. As to the sort of examination he gave me, the last examination he gave me he came in and talked to me and went out. He never touched me. I was sent from the St. Barnabas to the Minneapolis Sanitarium on the orders of Dr. Michael. Dr. Michael gave me just a brief examination one morning. It must have been around a couple of months that I was at the Minneapolis Sanitarium. It happened that I was transferred from the Minneapolis Sanitarium to the Asbury Hospital, I told them the kind of treatment I was getting. Dr. Michael had supervision over me after I was transferred from the Minneapolis Sanitarium to the Asbury Hospital,

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though I saw Dr. Bentley. Dr. Bentley had charge of the Government end of the [154] hospital. I saw him four or five times a day and in the evening a couple of hours. I saw Dr. Michaels perhaps three times a week; twenty minutes at a time during those times. I was treated for nerves at the Asbury Hospital and at the Minneapolis Sanitarium. I was at the Asbury Hospital altogether about five months. Then they sent me out to Lake Minnetonka. They gave me a cook to cook for me. I thought if I could be quiet out there I would get better, but the weather got so hot they sent me back to Kalispell, Montana, my home, at that time where my folks were living. Since then I have not been hospitalized. Both winters I have been confined to bed all winter. I stayed around Kalispell that summer. The next winter I was in bed all winter and that summer before I was at Kalispell and this winter I was in bed at Great Falls. I have been in Great Falls ever since. The fainting spells I spoke of first occurred at the base hospital, New London, Connecticut. I have been having them ever since. That was when I was first in the hospital. It was when I was able to be up and around. As to the frequency of those fainting spells, it used to be just when some big noise or excitement or something like that came up I would have them. Now, I go over any old time. I have from two to fifteen a day now. They last from sometimes a couple of minutes up to hours. They have been continuing that way since I guess in May, 1918, yes, in May, 1918.

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That was prior to my discharge from the navy. Nervousness, excitement, especially. Any sudden joy or fear or exhaustion brings on a spell of that kind. I have not earned a dollar since my discharge from the navy. As to work, I tried little things and usually I walked off without them being done, either that or a fainting spell. I put in an application for compensation and insurance money. It was some time in October, 1918. I have been drawing temporary total compensation of $80.00 a month since May, 1922. At that time I was broke. I was on my back and I had to be fed and had to have my hands lifted. By being broke I mean the compensation was taken away from me. They lowered the compensation to $8.00 and then I was raised to $40.00. Since my discharge up to May, 1922, I drew $80.00 and since then I have drawn $40.00. Since last October I have been rated to [155] $100.00, but I have not received any of it. A permanent total rating is required before you can draw $100.00. I am now rated permanent total. That dates back to October, 1922. Before entering the navy my occupation was mining engineer, bonding. I am a graduate of the Oregon State College and of the La Conner High School in northern Washington. Before entering the navy my health was excellent. I was never sick. I was never hospitalized for any purpose. I never received medical treatment of any kind. While going to college. I participated in swimming, basket-ball and football. I received seven letters all told. I

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have absolutely no warning when these spells come on. While in them I know nothing that happens. After one of them is over I feel weak and shaky. While having one of these long fainting spells I do not know what transpires or what I do. While on board the sub-chaser S. C. 42 I was engaged in sounding and convoying, just as much service as if out on the sea. We dropped a lot of depth bombs. We were flagship of a fleet of five. I do not know definitely whether that fleet at any time sunk any submarines. The Y gun that shoots off the bombs was located over my quarters. This Y gun shoots two depth bombs from opposite sides at a time. The jar of that gun is tremendous. At the same time they roll one over the stern. These depth bombs are three hundred pounds of T. N. T. which sink to a depth of a decimeter. They explode under water. A water-spout will come up two hundred feet in the air from it. Dropping these bombs affected my nerves. There was a tremendous jar. On board ship I had charge of the engine-room and all mechanical appliances. That is above the level of the water but below the deck of the water. There is only one depth to a boat. It is possible in the engine-room to tell if a submarine is near. You put your ear to the side of the boat and you can tell what the size of the boat is, in your vicinity. You can tell approximately whether there is more than one submarine in the immediate neighborhood. The different churns of

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the submarine is about the same as different tones of different bells. [156]

Cross-examination by Mr. HIGGINS.

I enlisted at the Puget Sound Navy Yards, Seattle, Washington, and was in training there over a year. My first and only service was on a sub-chaser. My disability came from a leak in the boat and entry of salt water. The combination of salt water with a chemical created some gas and I inhaled the gas. I have had considerable correspondence with the United States Veterans' Bureau.

Q. The basis of that correspondence has been the condition of your lungs, has it not?

A. And nerves.

Q. Have you ever written the department concerning the fainting spells you speak of?

A. I have. I have taken it direct to the doctors.

Q. Did you ever write to the Bureau?

A. No, I have handled very little correspondence, myself.

Q. Did you ever keep any copies of letters that you have written the Bureau?

A. My father has all his letters. I was physically examined at the time of my enlistment. I don't recall what my weight was. At the present time, my weight is perhaps a hundred and seventy. I have not weighed recently. I guess it has been a couple of years since I weighed. If you say my weight is nearer two hundred than one hundred and seventy, perhaps you are a better judge than I am. I don't recall what my weight

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was prior to going into the service. Yes, I was examined by Dr. Price in Spokane, as near as my memory recalls it was him. I don't know whether he was known as a neuro-psychiatrist. I know that his recommendation was that I go to work.

Q. You didn't want to go to work, did you?

A. I didn't want to? I couldn't. I am lucky if I can sit around without being in bed.

Q. You didn't want to go to work, did you? You didn't go to work, did you? [157]

A. I did not. My health would not permit it. I recall Dr. Little and the examination he made on me.

Q. Do you know what his report was concerning your condition?

A. I know his report was very malicious.

Q. You didn't think his report of your condition was correct?

A. I did not. Just afterwards Dr. Southmayd examined me, three days afterwards and found these ailments existed. I remember the examinations made by Dr. Conroy. His diagnosis was not similar to Dr. Little. Dr. Conroy's diagnosis was neurosis and T. B.

Q. Do you know why Dr. Conroy was not called as a witness in the case? A. I do not.

Q. Don't you know the reason he was not called was because he had telephoned that his testimony would be unfavorable to you?

A. I do not. I know I have his reports with

(Deposition of Herbert H. McGovern, Jr.)

his name signed to them. His reports were never submitted to the Bureau, I don't believe.

Q. You were in the hospital for a while during the time Dr. Little was making his examination of you?

A. He didn't make any examination of me while I was in the hospital. I didn't see him. Dr. Little didn't call on me at all while in the hospital, not once.

Q. You take issue with Dr. Little when he says he had you under observation, do you?

A. I went down to see Dr. Little, very briefly, after leaving the hospital.

Q. You remarked to him that his report was going to be unfavorable, didn't you?

A. I was advised so. I complained then against his findings.

Q. You remarked to him that you needed compensation, did you not?

A. I needed assistance. I did not tell him that I had a lot of obligations owing. I did not tell him I was indebted and that I needed the compensation in order to meet my debts. I didn't owe anybody at that time. I did complain to Dr. Little about the fainting spells.

Q. Did you have any fainting spells while in the hospital during the time of Dr. Little's examination?

A. As near as I can remember, I did. [158]

Q. They keep a chart in the hospital of all that happens, do they not?

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A. They were slack in that hospital. They didn't keep such a chart that I know of. I remember an examination made of me, by Dr. Josewich. The last examination he made of me he came in and talked to me, he didn't examine me at all. I went to him to have my lungs examined. He made an examination of my lungs.

Q. And he told you there was no active tuberculosis?

A. No, but the doctor before him said there was. This doctor from Thomas hospital, Dr. Barclay.

Q. Dr. Josewich said there was no active T. B.?

A. He told me that. As to treatment under Dr. Josewich's observation, I was not under the observation at all of Dr. Josewich.

Q. Three days after you were examined by Dr. Josewich you were removed to another hospital, were you not?

A. The next day I was removed to the asylum.

Q. You made no complaint to Dr. Josewich about these fainting spells, did you?

A. I was so sick I didn't know hardly what was going on. I belive I then came under the care of Dr. Michaels. He is a neuro-psychiatrist.

Q. His diagnosis was you were suffering from hysteria, was it not? A. Mental disorder.

Q. There is nothing the matter with your mentality now, is there?

A. I can't do anything. I can't work mathematics. I have lost all my education. I can't be around people. I have to be quiet.

(Deposition of Herbert H. McGovern, Jr.)

Q. You think clearly, don't you?

A. I haven't got ten per cent of my thinking power I used to have.

Q. You seem to remember events pretty well?

A. Fair.

Q. You understood everything that has gone on during the taking of this deposition, haven't you?

A. As near as I can comprehend I have. [159]

Q. You have been the subject of a good deal of sympathy on the part of friends and others, have you not?

A. I have not. Before enlistment I was making $100.00 and over a month and expenses. I have had a few physical examinations since September, 1921. Yes, there was active tuberculosis discovered in those physical examinations. Dr. Conroy of Kalispell discovered it.

Q. He was the doctor that was not called to testify in the case?

A. He didn't seem to be. I don't know whether his report was ever submitted to the United States Veterans' Bureau, at Washington, D. C.

Q. So his diagnosis is the only one since September, 1921, wherein it was discovered as active tuberculosis?

A. I had been rated $8.00 a month when I had the examination. That is only last winter and the fall before this. I was drawing $8.00 a month for T. B. before that. As to my lungs being alright now, I can't breathe very good.

Q. You don't cough, do you?

(Deposition of Herbert H. McGovern, Jr.)

A. I do, especially in the mornings.

Q. We have been here about an hour and I haven't heard you cough yet.

A. You haven't been listening. I know once distinctly I coughed since you have been here.

Q. You have coughed once in the past hour.

A. In the early morning and afternoon I do. Most every morning when I get up I have a coughing spell.

Q. How long have you been living here in Great Falls this time?

A. I came down shortly after election, the city election—no, I guess, county, or was it city.

Redirect Examination by Mr. MOLUMBY.

Dr. Little is in Kalispell, Montana. I don't know what position he has held in the American Legion. He never came to see me at all while I was at Kalispell. The examinations he made of me were in his office. They lasted ten minutes. He used this instrument over your ears and listened to my lungs, [160] the stethoscope. He never made an X-ray examination of me. I don't remember that he ever gave me any examination except the stethoscope. He did not come to see me during those three days while in the hospital. No doctors came to see me.

Q. Did you ever, at any time, have any trouble with Dr. Little?

A. When I first went down there for an examination he wanted to go down to Flathead Lake to go trap shooting and he got hardboiled on me.

(Deposition of Herbert H. McGovern, Jr.)

He called me a gold-bricker before he examined me. We had an argument at that time. I don't recall what sort of an examination he gave me at that time. He gave me no further examination than what I have just recounted.

Q. On how many occasions has he examined you?

Mr. HIGGINS.—That is objected to as repetition.

A. Two or three times, not over three. I don't know whether Dr. Conroy was subpoenaed in my case. There was no reason I might have had for not calling Dr. Conroy here. Other doctors in Kalispell examined me. Dr. Hueston and Dr. Conroy examined me at the same time. These doctors made out a report that I was totally and permanently disabled and sent it to the Goverment.

Q. Do you recall what they said in their report sent in to the Government?

Mr. HIGGINS.—That is objected to on the grounds that it is purely hearsay and the report itself is the best evidence.

A. I do not remember definitely whether that report was sent in to the Government. It was made out at my father's request.

Q. And they did make a report in writing, did they?

A. There was a report went at the time Dr. Hueston tried to railroad me to the State Asylum here, at Warm Springs.

Q. What sort of an institution is Warm Springs?

A. An insane asylum.

Mr. HIGGINS.—That is objected to as not having

(Deposition of Herbert H. McGovern, Jr.)

been shown that the report of Dr. Hueston was ever submitted to the Bureau.

A. This report was submitted to the Government. As near as I can remember, Dr. Conroy, at the same time, made an affidavit as to my condition.

Q. Do you know whether or not that was sent in to the Government? [161]

A. As near as I know, it was.

Mr. HIGGINS.—I move to strike that out as hearsay and conjecture.

A. I smoke some. I do not inhale the smoke. The Minneapolis Sanitarium, at the time I was confined there, was a Veterans' Bureau Hospital.

Q. They were supposed to report your condition to the Government, were they not?

A. They were, the Government paid my way there. That was a contract hospital of the Government.

Q. I will ask you if you know whether or not any reports of your condition were ever sent in by the Minneapolis Sanitarium?

A. They said there was.

Mr. HIGGINS.—That is objected to as hearsay.

Recross-examination by Mr. HIGGINS.

Q. Have you ever presented to the bureau, in affidavit form, the matters and things to which you have testified during the time of this deposition.

A. I don't recall that I have myself, my friends have.

Q. As a matter of fact, you never have, have you?

(Testimony of Dr. George E. Price.)

A. I couldn't tell you, I don't remember. My friends have put in numerous—

Mr. HIGGINS.—I move the last answer be stricken out as not responsive. It is purely self-serving.

TESTIMONY OF DR. GEORGE E. PRICE FOR DEFENDANT.

Thereupon Dr. GEORGE E. PRICE, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination by Mr. HIGGINS.

My name is George E. Price. I am a physician by profession and live at Spokane. I graduated from the University of Pennsylvania in 1898. I have never taken any other course, but since 1903 I have been specializing in nervous and mental diseases. As such specialist I had occasion to examine the plaintiff. At the time I was consultant for the Public Health Service. I saw [162] plaintiff once, on May 6, 1920. The examination took place at Spokane. It was the usual nervous and mental examination. The examination was sufficiently thorough for me to determine from a medical point of view whether or not the plaintiff was suffering from any nervous indisposition. After this examination, given to this plaintiff, I arrived at the conclusion that he had no organic nervous condition but that he did have hysteria. It is an ailment that might permanently but not totally incapacitate him. It is an indisposi-

(Testimony of Dr. George E. Price.)

tion that will respond to treatment. I observed in the instance of this particular patient why this condition was prevalent. I classed it among the compensation neurosises. That classification is a form of hysteria which we designate as compensation neurosis.

The COURT.—Analyze it.

A. I mean this hysteria may be due to many causes; there is the so-called war hysteria and there is the hysteria of litigation or compensation; I classed this with the latter.

The COURT.—An exciting cause?

A. Yes, sir.

Q. And it is comparable with what class of cases?

A. The case that we see after accidents, where there is a question of compensation after an accident.

Q. As to what is commonly termed a "railroad spine," what would you say?

A. Well there are two; you mean the hysterical railroad spine? Q. Yes, sir.

A. I would say that it is the same group. As to the prognosis concerning this case, the removal of the cause, under proper treatment, the case should recover.

Q. You mean that if this plaintiff knew definitely that he was not going to get any money out of the Government that his ailment would cease?

A. I would rather answer that in another way and say that almost invariably after accident cases, where the claimant receives a compensation in a

(Testimony of Dr. George E. Price.)

lump sum, [163] or where the claim is disallowed, that the claimant recovers very frequently within a comparatively short time without requiring any further medical aid. Pension or compensation neurosis is a recognized condition of the medical profession. One of the men connected with the Veterans' Bureau wrote an article, I think about two years ago, in the Journal of the Medical Association in which he referred to that, to the prevalence of that condition. My recommendation, after examining the plaintiff was this, as I remember it; I said that while I felt that employment would be the best thing for him, I felt further that under the circumstances the best thing would be to send him to a neurologic hospital. I recognize page No. 63 of Plaintiff's Exhibit No. 13. That is over my signature. That shows my conclusions with reference to this plaintiff after my examination of him.

Q. And it reads as follows: "Herbert McGovern; neuro-psychiatric examination; this man presents no signs of mental despond or feeble-mindedness; he has no symptoms of organic or nervous disease; the attacks described by him are typically hysterical, which fact is in harmony with the man's general deportment, longing for attention and craving for sympathy, etc. Diagnosis, hysteria; recommendation: work would be the best form of treatment for this particular case; as this will undoubtedly meet with strenuous opposition I would suggest his being sent to a neurological center for treatment."

(Testimony of Dr. George E. Price.)

A. That was my report to the bureau. I heard the testimony of Mr. Carey, Father Callahan and Herbert H. McGovern, Sr., in this action. I heard only a part of the testimony of Dr. Dora Walker. I didn't hear the testimony of Lola Beller. The symptoms, as shown by the testimony of these witnesses, indicate plaintiff to be very hysterical. After the examination that I have made personally and after listening to the testimony of those witnesses whose names I have given, I would say that plaintiff is totally disabled but not permanently disabled.

Q. Would you say that he is permanently and totally disabled from continuously following a substantially gainful occupation?

A. No, I wouldn't want to answer that; I would say he was totally but not permanently [164] disabled, by virtue of a definite condition—hysteria.

Q. And if the cause of that were removed, which is a desire for compensation or insurance, would the malady be corrected?

A. I would answer in general, not special. I would say that the removal of the cause and under the proper treatment, hysteria is a curable disease. I examined the lungs of the plaintiff only in a general way. I listened to the heart and lungs. I did not find any evidence of tuberculosis. I would like to qualify that answer by saying that the examination was not such a one as should be made for the deduction of slight degrees of tuberculosis; it was out of my province and was done by men who are skilled

(Testimony of Dr. George E. Price.)

in that work. The examination made by me with reference to tuberculosis was not a thorough one.

Cross-examination by Mr. MOLUMBY.

Hysteria is a well-defined disease in medical science. One could not be as badly disabled from hysteria of the type these people have been testifying to as one could be from almost any other cause. I have testified he was totally disabled. Hysteria is not a conceivable injury. I would not say it is not a specific injury. I would say it was a specific clinical entity. It is a disorder of conduct, of personality; there is no evidence of any physical injury. I examined plaintiff on May 6, 1920, on one occasion only, as I remember it. I don't remember whether the examination was in my office or in the hospital. It has been three years ago and if it were not for my record I would not have any clear recollection of the case. I should say the average examination of that character is anywhere from thirty minutes to an hour, the majority over half an hour.

Q. After hearing the testimony here to-day and that you did hear of Mr. Carey and Father Callahan, myself—Mr. Molumby—and the other witnesses that you heard, would you say that the symptoms that they have described were natural symptoms of the disease that you concluded that he had at that time?

A. I would; also I witnessed an attack he had out in the lavatory to-day. I would say that it was like a hysterical attack. When these attacks extend over a long period of time, I would say it was harder

(Testimony of Dr. George E. Price.)

to produce a recovery; I [165] wouldn't say it is doubtful. A lack of recovery is possible but not at all probable.

Q. Is it reasonable to suppose they would not recover to such an extent as to be totally well?

A. That is—I can't answer that yes or no. I would say it would depend entirely, I should judge, on the way the case was handled. Those cases, as long as the condition itself is capitalized or is bringing a financial return, the condition is going to continue. That is the usual history. It is possible that some other exciting cause might exist other than the fact that he was seeking compensation.

Q. The fact that he never did get more than forty dollars and generally got eight dollars, would, in your opinion, seem to be an inciting cause?

Mr. HIGGINS.—We object to that as an incorrect statement of fact.

The COURT.—The doctor may answer; in so far as not supported by facts is not competent and the Court will not consider it.

Mr. HIGGINS.—Exception.

A. I would say that the expectancy of compensation is an equally strong factor in the litigation cases.

Q. Would you say, Doctor, that tuberculosis coupled with a nervous shock would be an inciting cause to hysteria of this nature?

A. I have never seen any reference to that in the text-books. My own experience I have seen tuberculosis occurring in hysteria cases. I would con-

(Testimony of Dr. George E. Price.)

sider that as a coincidence rather than as a cause of hysteria. Where a combination of nervous shock and tuberculosis exist I would say that the nervous shock was probably the sole cause. It is possible that the tuberculosis would lessen the nerve resistance to a certain extent. As to its probability, I cannot recall, as I stated, any reference to it in the literature, nor can I from my own experience, where that was considered as an exciting cause, although I will admit it is possible. I cannot say that he was totally disabled, totally unfit to follow a gainful occupation at the time I examined plaintiff. I cannot answer such [166] question from my recollection of the case or from my report. I wouldn't know.

TESTIMONY OF DR. WILLIAM S. LITTLE, FOR DEFENDANT.

Thereupon Dr. WILLIAM S. LITTLE, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination by Mr. HIGGINS.

My name is William S. Little. I am a physician and surgeon in general practice. I am a graduate of the University of Elizabeth, 1906. Since that time I have been either practicing my profession or been in the army. I practiced in Weeksbury, Kentucky, two years and Kalispell, Montana, since 1910. I know Herbert H. McGovern, the plaintiff in this action and have known him since September

(Testimony of Dr. William S. Little.)

2, 1920. I know his father. I have known him for quite a long time before that. I don't remember definitely when I first met Mr. McGovern. The first meeting that I had with the plaintiff was when he was sent to me for examination by the Veterans' Bureau. At that time he said that he had tuberculosis. He was sent to me under orders; sometimes there is a notation as to what the condition is and sometimes there is not and I don't remember whether it was tuberculosis or not, or whether there was any notation at all on his order for examination. I took the history of his case as given by him, in making my ratings. It is customary to give consideration to the history of the case as given by the patient and in making my conclusion regarding this case I gave consideration to what the plaintiff had told me concerning his condition and the history of his case. I gave him a thorough examination, at that time, as is customary with a general practitioner. It wouldn't be as thorough as a chest expert; I didn't have his lungs X-rayed at that time. From the examination that I made of him, I did not find any indications of tuberculosis. As to the examination of his chest, lungs and sputum, I don't think I had his sputum examined at that time. I examined plaintiff at a later time. He came about November 12th and was dissatisfied evidently from what he had heard from the Veterans' Bureau, and he said he was sure he had tuberculosis, and I suggested [167] to him that he write in to the Veterans' Bureau and have his case reopened and I

(Testimony of Dr. William S. Little.)

would give him a more thorough examination. Rather, I told him I would put him in the hospital for a while and see if he showed any evidence of tuberculosis from his temperature. He was put in a hospital. I forget for what period I observed him in the hospital. He went in the hospital November 12th, and I don't know exactly how long it took me to come to a conclusion on it, probably four or five days to a week. I found no trouble with his lungs. Respecting the plaintiff's habit as to cigarette smoking. Well, he smoked. When I first examined him he had a slight cough, and when I put him in the hospital I requested that he quit smoking cigarettes while he was there, so as not to cause any bronchial irritation, and I was informed that he smoked several packages of cigarettes a day while he was in there. When I came around there was no evidence of cigarettes. Prior to the time plaintiff finally learned what my report was to be, I had a conversation with him. After he was discharged from the hospital he came down to my office and asked me what my findings were and I refused to tell him. I told him he would hear from the Veterans' Bureau, and he told me he was satisfied I had found nothing wrong with him, and that something had to be done; that he had incurred some debts and that they would have to be paid and he had been getting compensation from the Government; he thought he was going to get all of these, and that compensation had been cut down and put him up against it. I was in Kalispell during the

(Testimony of Dr. William S. Little.)

fall of 1922. I saw plaintiff there a number of times during that time.

Q. And with respect to automobiles did you see him, Doctor?

A. Yes, I saw him, with one exception I saw him in an automobile probably four or five times, when I saw him walking one time.

Q. What was he doing when you saw him in the automobile, Doctor?

A. He was driving the car.

Q. Did he complain of any nervous or mental disorder to you at the time of your examinations or observation of him?

A. There was no nervous condition suggested at that time; he gave no history of any, and I had no cause to suspect any nervous condition. [168]

The COURT.—When was this, Doctor?

A. This was in September and November, 1920; he made no claim of any nervous condition. In giving me the history of his case he mentioned no nervous disorder or affliction or mental trouble, it was all his lungs. I recognize Defendant's Exhibit 18, which is a photostatic copy of report that I made.

Q. And the first page of which the date isn't very clear. Looks like it might be September 2, 1920?

A. Yes. That is the report showing the condition of the plaintiff, that I made on that date.

Q. And sent where?

A. I think at that time we were sending them directly to Minneapolis.

(Testimony of Dr. William S. Little.)

Q. And showing you the next sheet of paper, dated November 22, 1920, I will ask you if you recognize that?

A. That is probably the date it is received. The date of that is November 12.

Q. Yes, dated November 12th. You recognize that, Doctor, as a photostat copy of an original made by you of your examination and observation of the plaintiff?

A. I do. I probably sent that to Minneapolis.

Mr. HIGGINS.—We offer that.

Mr. MOLUMBY.—We object to it on the grounds that as far as the copy is concerned it is merely a self-serving declaration, being made by an agent of the Government, and as far as verifying any substantive evidence is concerned they have Dr. Little here himself and he can testify to it.

The COURT.—It may be admitted in evidence. I doubt myself if it has any evidential value, in so far as the Doctor has reported the contents.

Mr. HIGGINS.—Just for one purpose, to complete the record as given to the Bureau in Washington upon which findings were made.

The COURT.—It may be admitted; if it has any value the Court will take it into consideration. The objection will be overruled formally, and exception noted. [169]

DEFENDANT'S EXHIBIT XVIII.

UNITED STATES OF AMERICA.
UNITED STATES VETERANS' BUREAU.

March 20, 1922.

PURSUANT to Section 882 of the Revised Statutes, I hereby certify that the annexed photostatic copies of Medical Report signed William S. Little, dated Sept. 2, 1920; and Medical Report signed W. S. Little, dated Nov. 12, 1920, are true copies of the originals on file in this Bureau.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States Veterans' Bureau to be affixed, on the day and year first above written.

C. R. FORBES,
Director of the United States Veterans' Bureau.

SCHEME OF REPORTS OF PHYSICAL EXAMINATIONS.

Place—Kalispell, Montana,
Date—September 2d, 1920.

1. Claimant's name—Herbert H. McGovern, Jr. (C193–312)
2. Service organization and rank—M. M. 1st. cl. U. S. N. R. F.
3. Present address—Marion, Montana.
4. Age—28. Color—White. Previous Occupation—Mining Engineer.
5. Brief military history of claimant's disability: About the 20th of May, 1918, some salt water leaked through the deck of S. C. No. 42, getting in the batteries, claimant in-

haling the fumes, went on sick report at once, was transferred to the B. H. at New London, Conn. There about thirty days, from there to Hospital Annex, Eastern Point, Conn. From there to Ft. Lyons, Colo. From there to Woodman Sanatorium, Colo. Was discharged from there, discharge coming through Ft. Lyons.

6. Present complaint: Tuberculosis, chronic.
7. Physical examination: Claimant is well nourished, chest is moderately flat, weight 163, height 71½ inches. Pulse before exercise 88, after 130, to normal in 3 minutes. B. P. D90, S–130. The chest expands normally, breath sounds normal. Patient has a slight cough, which might be simulated, if not it is bronchial. No rales or other evidence of condition claimed.
8. Diagnosis is: Tuberculosis, chronic.
9. Prognosis: Good. [170]
10. Is claimant able to resume former occupation? Yes.
11. Do you advise it? Yes.
12. Is claimant bedridden? No.
13. Is claimant able to travel? Yes.
14. Do you advise hospital care? No.
15. Will claimant accept hospital care? Yes.
16. Is there a reasonable presumption that the applicant has a disability due or traceable to his military service? Yes.
17. What is the degree of his vocational handicap resulting from the disability? Physical

findings show none. Subjective symptoms show practically 100 per cent.

18. Does his physicial and mental condition render training feasible? Yes.

Requested August 26th, 1920.

Signature—WILLIAM S. LITTLE,

Grade— ————————.

Nov. 22, 1920.

REPORT OF PHYSICAL EXAMINATION.
U. S. PUBLIC HEALTH SERVICE.

FEDERAL BOARD FOR VOCATIONAL EDUCATION.

Bureau of War Risk Insurance.

c No. C–193 312. D No.....

Read Instructions on Back Before Commencing Examination.

Place—Kalispell, Montana.

Date—Nov. 12th, 1920.

1. Claimant's name—McGovern, Herbert Hugh, Jr.
2. Service, rank, and organization—M. M. 1st. cl. U. S. N. R. F.
3. Present address—Marion, Montana.
4. Age—28.
5. Color—White.
6. Principal previous civil occupation—Mining Engineer.
7. Date of induction—June 17th, 1917.
8. Date of discharge—Oct. 17th, 1918.
9. Brief military history of claimant's disability: About the 20th of May, 1918, some salt

water got through the deck of S. C. No. 42, getting into the batteries, claimant inhaling some of the fumes. Sent to B. H. New London, Conn. to Hosp. Annex Eastern Point, Conn., to Ft. Lyons, Colo., to Woodman Sanatorium, Colo., for discharge.

10. Present complaint (see par. 10 on reverse): General weakness.

11. Physical examination (claimant must be stripped): B. P. 140/90, rate 88, after exercise, 128, in two minutes to 100. There are no rales, breathing is apparently normal in all parts of the lungs. Heart action is good. This claimant was so persistent that he was tubercular that I put him in the hospital for three days. During that time his temperature was not above normal, and his pulse rate not above eighty. He is well nourished and developed, and there are no indications whatever of tuberculosis. I have inquired as to his actions at his home, where he tells me that he has to spend most of his time in bed and am told that he is very active and outdoors all the time indulging in strenuous exercise. It is my opinion that if this man ever did have anything wrong with him the condition is relieved now. He says that he is too weak to work and owes a lot of money, and has to have his compensation raised to pay his debts. I can see no reason for this man getting any compensation whatever.

Vision (Snellen chart) (Uncorrected 20–20 R. 20/20, L, 20/20), (Corrected by claimant's glasses R./20, L./20) [171]

Hearing (spoken voice) (R. 20/20), (L. 20/20.)

12. Diagnosis: No pathology.
13. Prognosis:
14. Is claimant able to resume his former occupation? Yes. Any occupation ——.
15. Is claimant bedridden? No.
16. Is claimant able to travel? Yes.
17. Do you advise hospital care? No.
18. Will claimant accept hospital care?
19. Has claimant a vocational handicap? (See par. 19 on reverse.) No.
20. Is his physical and mental condition such that vocational training is feasible? Yes.
21. Did you examine the man yourself on this date? Yes.
22. Any other remarks:

Name—W. S. LITTLE, M. D.
Title—Designated Examiner.
Address—Kalispell, Montana.

TO BE FILLED OUT IN DISTRICT OFFICE.

B. W. R. I.

This report is in response to B. W. R. I. request of ——, 192

————,
District Supervisor,
District No. ——.

F. B. V. E.

In my opinion the disability is —— due to service

Training is ———— feasible.

The applicant has —— a vocational handi cap.

Follow- up report is —— necessary every ——days.

————, 192.
———— District Medical Officer
District No. ——

INSTRUCTIONS FOR FILLING OUT THIS REPORT.

(Number of paragraphs correspond to questions on other side.)

9. Give a brief military history as stated by the claimant, showing the connection between his disability and his military service. Give nature of injury or illness, when and where incurred and treated, and whether discharged on that account.

10. In recording the man's complaint, give SYMPTOMS as stated by him; do NOT give a diagnosis.

11. (a) In recording the results of a physical examination, do NOT give a diagnosis; give the PHYSICAL SIGNS as you find them.

(b) In cases of WOUNDS, give location and size of scars and whether or not they are adherent and tender. ALSO, a description of the injury to the underlying structures, with the resulting deformity, disturbed function, and limitation of motion expressed in degrees. Similar notation must be made in case of arthritis.

(c) When the applicant complains of dyspneea on exertion as a sequela of GASSING, HEART DISEASE, or bronchial ASTHMA, note his pulse and respiration before, just after, and 2 minutes after

exercise, which should consist of hopping 25 times on each foot.

(d) In cases of HEART DISEASE, given general appearance, location of apex bent, and time of occurrence, location, and direction of transmission of murmurs, and rate and rhythm of pulse.

(e) If the claimant is wearing glasses, record the vision as corrected thereby. It is not expected that the general examiner will attempt to fit proper lenses. If impairment of vision or hearing is found, the case should be referred according to the District Supervisor's instructions.

(f) In cases of neuro-psychoses, an additional special report must be rendered by a competent neuro-psychiatrist. Refer these cases according to the District Supervisor's instructions. [172]

(g) If, in addition to the disability due to service, the man has any other impairment, describe it fully.

12. Use the nomenclature of the United States Public Health Service.

18. Training is feasible when the mental and physical conditions permit AND when the suggested occupation is not incompatible with his disability.

19. A claimant is considered to have a vocational HANDICAP when his disability would constitute a handicap in his former occupation, such as to affect employability or earning power.

Men without a vocation, i. e., students, and those who have not worked at one occupation more than one year and are under 21 years of age, should have their handicaps considered in light of general labor market.

SPECIAL TUBERCULOSIS REPORT.

(In cases of suspected pulmonary tuberculosis, the following information must be furnished in addition to the report on the other side of this sheet.)

If the man has been treated since discharge, obtain, if possible, a statement from the physician showing the disability for which the man was treated and the date on which treatment began. In recording the results of the physical examination (question 11 on obverse side), give all the physical signs found on inspection, percussion and auscultation, so that it may be clear that there are reasonable grounds for making a diagnosis of pulmonary tuberculosis.

Height, with shoes —— inches. Temperature, —— F. Time of day —M. Pulse ——. Weight (without coat) present ——. Did you weigh the man yourself? ——. Normal ———————— —.
(Man's statement)

Highest (Lbs. ———— (Date ———— Lowest (Lbs. ———— (Date ————

Sputum: Positive or negative ——. If negative, for how long? ——.

By whom was the sputum examined?

——— (Do not defer rendering this report if sputum examination is not feasible. Obtain from the man the address of the last person or

(Testimony of Dr. William S. Little.)

institution by whom a sputum examination was made.)

Diagnosis ————————————————————

(Specify the extent and location of the lesion.)

Classification—National Tuberculosis Association Standards.

Condition—Active, quiescent, apparently arrested, or arrested. (Underscore the condition found.)

Stage—Incipient, moderately advanced, or advanced. (Underscore the stage found.)

Name of examiner ———————— M. D.

Date ————, 192 Address ————————.

Cross-examination by Mr. MOLUMBY.

My first examination was on September 2d. I didn't know about plaintiff being examined in Spokane by Dr. Price until after the second examination, and then plaintiff told me about it. I think Dr. Price said he examined him in May. [173]

Q. You heard Dr. Price's testimony a few moments ago; it must have been a week or two afterwards.

A. I think Dr. Price said he examined him in May, didn't he? It was several months after that. My second examination was in November, 1920. I don't know where plaintiff went after that. He disappeared for some time; at least, his father didn't know where he was and his father tried to

(Testimony of Dr. William S. Little.)

get me to find out where he was; and the next thing we heard about him, he was in Great Falls. His father and I are good friends. I mean "for some time," a couple of months, along about that time and Christmas. I didn't know that he was in the St. Barnabas Hospital in Minneapolis in November, the same month I examined him. I did not make an X-ray examination of his lungs the second time I examined him.

Q. Just what examination did you give him the second time that you didn't give him the first time?

A. I just had him in the hospital and had them take his temperature about half a dozen times a day; active tuberculosis will almost always show temperature. It is not possible that he had an arrested case of tuberculosis at that time. I found no evidence of an arrested case of tuberculosis.

Q. You couldn't state as to whether he ever had any tuberculosis or not from the examination you made?

A. No, he had an X-ray picture taken at Fort Lyons and he had this picture with him, which he showed to me, and it showed some enlargement of the bronchial glands.

Q. You observed nothing at all concerning his nervous condition at that time, Doctor?

A. Only after my second examination, he came to my office and he got very much excited about the examination; he said he was going to have his compensation raised regardless of where he had

(Testimony of Dr. William S. Little.)

to take the case, and he was going to take it right up to Washington to get it squared up, get it straightened out. From my observation of plaintiff, there was no disability that I could detect. I completed the examination probably about the 16th or 20th of November, 1920.

Q. I will ask you if, under date of January 4, 1922, Doctor, you did not write [174] to the United States Veterans' Bureau, Chief Placer Building, Minneapolis, and state that this man has been drawing total compensation from tuberculosis; that there was no indication whatsoever of any nervous disability; that if he were to get any compensation at all he was entitled to either total or none at all?

Mr. HIGGINS.—We object as being improper cross-examination and occurring at a date subsequent to the 31st day of August, 1919.

The COURT.—He may answer. This is an appeal to your recollection. If you cannot recollect you have a right to see the document.

A. What was that question. If I could see the document.

Q. I will ask you if you did not write a letter of that kind. It is nailed together here?

A. I can explain that letter if you want me to. I wrote that letter but I could explain why I wrote it. He came back; I didn't know he was back in Kalispell at that time until the Red Cross nurse came to me and also the Legion Commander and the Secretary of the Chamber of Commerce;

(Testimony of Dr. William S. Little.)

all three of them spoke to me about a man who wasn't getting properly treated by the Veterans' Bureau and I am the only one over there connected with the Veterans' Bureau, and of course it was up to me to explain the situation, and I wrote back to get the history of his case, to find out whether he really had a neurosis or had a disability, and I wanted the Veterans' Bureau to get the matter straightened up, because I have never had any trouble with these ex-service men over there, with the exception of this case, and I didn't want the impression to get out in the community that the Veterans' Bureau was not properly taking care of these men, and that is why I wrote the letter.

Mr. MOLUMBY.—We would like to offer this letter.

Mr. HIGGINS.—We object, if the Court please, on the ground that this letter is not the basis of disagreement between plaintiff and defendant. For the further reason that it was written subsequent to the 31st day of August, 1919, and for the further reason it was written after the institution of this suit. [175]

Mr. MOLUMBY.—No, it was written January 24, 1922.

The COURT.—Well, I assume, of course, it is only offered because you assume it contradicts the doctor's statement somewhat.

Mr. MOLUMBY.—And it also goes to show the mental attitude of this witness.

The COURT.—It may be introduced for that

purpose. The objection will be overruled and exception noted.

PLAINTIFF'S EXHIBIT XIX.

TREASURY DEPARTMENT.

UNITED STATES PUBLIC HEALTH SERVICE.

January 4, 1922.

From: Dr. W. S. Little,
Designated Examiner,
Kalispell, Montana.

To: District Manager, District No. 10,
U. S. Veterans' Bureau,
Keith-Plaza Building,
Minneapolis, Minnesota.

Subject: Herbert Hugh McGovern, C–193312.

This man a few months ago returned from Asbury Hospital, Minneapolis, presumably receiving $80.00 a month compensation for total disability. He was examined by a Clean-up Squad and has since had his compensation cut to $8.00 a month, I understand.

He has retired to his bed threatening to commit suicide and has enlisted the aid of the American Legion, Red Cross, and what other organizations he can get to give ear to his trouble. Of course, he is representing that he is a worthy case.

I have examined this man two times, once on September 2, 1920, and again on November 12, 1920. At this time there was no indication whatever of any nervous disability. He had been drawing total compensation for tuberculosis, as your

(Testimony of Dr. William S. Little.)

files will show you. This compensation had been cut and he informed me that he had to have this money to pay his debts that he had incurred under the supposition that he was always going to receive compensation for total disability. It was a short time after that, I understand, that he developed this nervous condition for which he was hospitalized. [176]

While I have had no opportunity to examine this man since my last report on November 12, 1920, his actions at that time and his subsequent development lead me to believe that if there is a neuroses it is self inflicted. I do not know what report was made on him at the Asbury Hospital, but taking this case as I see it I do not believe that this man has a disability of any kind. I understand he is getting $8.00 a month compensation now. If he has a disability at all he should be getting a compensation for total disability, otherwise he should not receive any.

I would request that the Director take up this case in some way so as to have it definitely settled. This has been the only case in my territory here where there has been any criticism as to the actions of the Bureau and I would like some action taken to shut this man up.

W. S. LITTLE, M. D.,
Designated Examiner.

Redirect Examination by Mr. HIGGINS.

This is the only case about which I have had any trouble, of those I have examined. The father of

(Testimony of Dr. William S. Little.)

this boy and I are good friends and have been for a long time; more so since the boy's case has come up before the Veterans' Bureau; before that I had only a speaking acquaintance with him.

Q. Is your disposition generous or otherwise in giving veterans war ratings?

A. I always try to give them the benefit of any possible doubt. I was actuated by the same character of judgment in this case as in other cases.

TESTIMONY OF DR. ALEXANDER JOSEWICH, FOR DEFENDANT.

Thereupon Dr. ALEXANDER JOSEWICH, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination by Mr. HIGGINS.

My name is Dr. Alexander Josewich. My profession is physician. I have been practicing such over ten years. I have specialized in internal medicine, particularly tuberculosis. I have had over ten years' experience in that work. I am acquainted with the plaintiff. I first met him December 6, 1920. He was a patient in St. Barnabas Hospital, Minneapolis, then a contract hospital for the Public Health Service and he came under my care as I was the attending specialist in tuberculosis at that time. I gave the plaintiff, at that time, [177] what I would consider a very thorough examination. I gave an X-ray examination and a physical and laboratory examination. I was looking par-

(Testimony of Dr. Alexander Josewich.)

ticularly for evidence of tuberculosis. The plaintiff remained there three days. From my examination, made at that time, I found no evidence of clinical tuberculosis. I examined his sputum and gave him all of the tests that medical science ordinarily gives to determine whether or not a patient is suffering from tuberculosis. From that examination I did not find the plaintiff suffering from tuberculosis.

Q. Now why didn't the plaintiff stay longer with you?

A. He devoloped an emotional disturbance on the 9th of December, necessitating his removal to another institution. Prior to that time I think I informed plaintiff of my findings with reference to his case as to tuberculosis. I am not sure. It is my practice in all cases to inform the patient of my findings. It would be very likely that I informed him in this instance when the man was sent back there for that ailment and I discovered he didn't have it. I saw him when he was in Asbury Hospital but not in the sanitarium. I made another examination of plaintiff, I believe it was on March 24, 1921, at Asbury Hospital in Minneapolis. This examination was made for the purpose of determining whether the patient had any evidence of tuberculosis. From this examination I found no tuberculosis. The next time I saw plaintiff it was some time in May. As to his condition at that time, I didn't examine him; he seemed to be fairly well though. He had a good color, good

(Testimony of Dr. Alexander Josewich.)
weight, apparently, and looked well nourished. As to his mental condition, as I observed it, he was rational and seemed to be very alert.

Q. And discussing what subjects with him?

A. Oh, the ordinary subjects as to future care, his plans.

Q. And did he ask you for a prescription at that time? A. Yes, he did.

Q. And what kind of a prescription did he ask for?

A. He said that he thought a liquor prescription would help him very materially, inasmuch as he had been used to having some whiskey in his cabin, that he used very little of it. I gave him a prescription for whiskey. When he came to me for [178] examination and before I examined him I got his history; that history consisted of where he had been at other hospitals and what he told me concerning his own case.

Q. And any rating that you would give him would be based upon the history of the case, as well as what you actually found yourself?

A. I didn't give any rating; we don't give ratings. Express opinions.

Q. That is, you made a diagnosis?

A. I made a diagnosis, yes. That is what I mean by "opinion," and in making those diagnoses and in giving opinions, I was influenced by the history of the man's case as given by himself, as well as what I could find myself as to his condition.

(Testimony of Dr. Alexander Josewich.)

Cross-examination by Mr. MOLUMBY.

I examined plaintiff first December 6, 1920. I don't know when Dr. Little examined him. Explaining the meaning of the word "clinical," we divide tuberculosis into infection and disease. We may have infection and not disease. Practically ninety per cent have an infection before we are fourteen years of age and yet comparatively few of us develop the disease. We try to be practical about our classification, and if we have no evidence of clinical tuberculosis we feel reasonably sure that the disease does not exist, although the person may have an infection. I could not say from my examination that it was impossible for him to have had tuberculosis prior to the date I examined him. It was very possible that he did have tuberculosis prior to that. As to whether there was anything in my examination which would indicate one way or the other whether he did have tuberculosis prior to that, I had no evidence of tuberculosis at that time. Yes, it was three days after my examination of him that he showed this sudden nervous condition. It was on December 9th. He was transferred from St. Barnabas Hospital in Minneapolis to the Minneapolis Sanitarium by the District Manager, not upon my recommendation but at the recommendation of Dr. Michael, I believe, who had examined him prior to the time he was transferred. After I told him that I could find no tuberculosis, he showed no personal animosity toward me. On the

(Testimony of Dr. Alexander Josewich.)

other hand, I think I was one of McGovern's best friends. [179]

Q. And if he were faking and attempting to get compensation from the Government under a false claim of tuberculosis and you balked at that thing, he would naturally show animosity toward you, wouldn't he? A. Yes.

Q. Always been friendly to you? A. Yes.

Q. Few doctors that he has been friends to?

A. Yes. I am not familiar enough to state whether that is a characteristic of hysteria. As to my familiarity of the characteristics of hysteria, I have seen some cases. I should think it possible that one who had hysteria disorders, such as have been described here, would appear on occasion alert and clear minded.

Q. That in no way indicates he did not have nervous hysteria or disorder?

A. I should say not.

Q. As a matter of fact, those who do suffer from such disability are generally alert and clear, are they not?

A. That is variable. It is not necessary to find germs from sputum to determine whether there is tuberculosis. We frequently diagnose tuberculosis where there is absolutely no sputum.

Q. Then, Doctor, in these examinations which preceded yours, where they found tuberculosis probably a year or so prior to that although they found no indications in the sputum of tuberculosis, he might nevertheless have had tuberculosis?

(Testimony of Dr. Alexander Josewich.)

A. Yes, indeed.

Q. And their finding that tuberculosis existed might be correct? A. Surely.

Q. Doctor, in your experience as tubercular specialist have you ever found that hysteria resulted from tuberculosis or a companion with it?

A. I have never seen it. It is a thing that is not likely to happen, but I should think it would be possible. At times, tuberculosis affects the nerves, but very rarely.

Q. When it is affected to such an extent that one who had a nervous shock might [180] get hysteria as a result, from a combination of the two?

A. That would depend largely upon the stage of the disease and the toxin resulting from that disease.

Q. will ask you, Doctor, if at the time you examined McGovern, or the several times you examined McGovern in Minneapolis there, if in your opinion he was permanently disabled, totally disabled?

A. I can answer that—I will have to answer that question in two answers. You are asking a double question. He was totally disabled at that time, and he might have a permanent disability.

Q. In your opinion it was reasonable to suppose that total disability might continue during his lifetime? A. I should say, very likely not.

Q. There is a possibility, is there, Doctor, that it would continue?

A. There is always that possibility.

(Testimony of Dr. Alexander Josewich.)

Q. It is not an improbability is it, Doctor?

A. No, not with any of us.

Redirect Examination by Mr. HIGGINS.

Plaintiff had no tuberculosis when I examined him. There would be no reason that I can see for tuberculosis, as a contributing cause, to bring about this hysterical condition at that time. From my examination at that time, I would not rate his as "permanent and total." The reasonable supposition would be that he would improve. The rating that I would give him would be from the mental disturbance he exhibited after I examined him for tuberculosis.

TESTIMONY OF M. L. STIFFLER, FOR DEFENDANT.

Thereupon M. L. STIFFLER, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination by Mr. HIGGINS.

My name is M. L. Stiffler. I am a physician and graduate of the University of Colorado, 1913, and have been practicing my profession continuously [181] since that date, at Denver, in South Dakota and in Minneapolis. I have confined my work entirely to mental and nervous diseases. I heard the testimony of Dr. Price. I heard the testimony of the witnesses on behalf of the plaintiff in the persons of F. L. Carey, Father William R. Callahan, Loy Molumby, Herbert H. McGovern, Sr., Lola

(Testimony of M. L. Stiffler.)

Beller, Dr. Dora Walker and Dr. Thomas Walker. There is such a thing as "pension" or "compensation" neurosis. It is a recognized condition in the medical profession and may be commonly likened to "railroad spine," perhaps, as it is frequently spoken of; it is a common term.

Q. Now, after hearing all of the testimony in this case so far, both on behalf of the plaintiff and on behalf of the defendant, what would be your expert opinion as to the cause or condition of the plaintiff in this case, assuming him to be suffering as recited by the witnesses for the plaintiff?

A. If I am entitled to an expert opinion on that, I would say that he is suffering from hysteria; and you ask me the cause of that?

Q. Yes, sir.

A. The cause of that in all probability was his anxiety regarding his receiving compensation from the Government.

Q. Did the symptoms, as shown by the testimony of these various witnesses, indicate epilepsy or psychosis?

A. It is a difficult question to answer by yes or no, because there are many symptoms that are common to epilepsy, psychosis and hysteria. Taking all the symptoms into consideration, however, I would say no.

Mr. MOLUMBY.—I don't think that answer is responsive to the question, because I don't think the Doctor heard the question.

The COURT.—I think he did. I think it is a

(Testimony of M. L. Stiffler.)

fairly cautious answer of a conscientious expert, fairly responsive from the stand. Motion denied.

Q. Doctor, you heard some testimony to the effect that a hysterical condition would be produced by tubercular condition on the part of the patient. Have you ever had any experience along that line in the practice of your profession?

A. I have never seen a case where tuberculosis could be called the sole cause. [182] If tuberculosis were any cause it would be a remote one.

Q. Now, if the plaintiff in this case is suffering from hysteria by virtue of his unsatisfied desire for compensation or insurance, what would you say would be the effect upon the plaintiff if it were definitely decided that he was to be denied insurance?

A. The immediate effect would only have to be guessed at, and might be either good or bad. Eventually, however, the effect would be good. The cause, in other words, of his condition would be removed.

Q. Would you say, Doctor, that under medical ratings of the United States Veteran's Bureau, under the rating as provided by the United States Veterans' Bureau, medical ratings, that the plaintiff in this case is permanently and totally disabled? A. I don't think so.

Cross-examination by Mr. MOLUMBY.

As to the basis of my statement that the cause of this man's condition was want of compensation, I necessarily have to base my opinion on the state-

(Testimony of M. L. Stiffler.)

ments that have been made by other witnesses. I have never examined this man; particularly the statements of the witnesses Dr. Price and Dr. Little, as indicated in their testimony that he stated he was desirous of compensation.

Q. Doesn't every man who makes application for compensation desire compensation? A. Yes.

Q. Isn't it just as reasonable to suppose, Doctor, that one might now suffer from hysteria who has since his discharge from the navy suffered from tuberculosis and who also received a nervous shock while he was in the service?

A. No, I don't think so.

Q. You don't think a man could suffer from hysteria under those circumstances?

A. He could. I thought you said "just as likely."

Q. Don't you think the compensation is more likely of it?

A. Of this particular form of trouble, yes. Those who have pensionitis, railroad spine and compensationitis, very frequently have fits of this kind [183] which last anywhere from two minutes to half an hour or an hour.

Q. Then such a disability in itself is such a disease or disability, is it not? A. Yes, sir.

Q. Which is just as serious and disables him just as much as any other sort of disability, doesn't it, Doctor? A. Temporarily.

Q. And if allowed to extend over a period of

(Testimony of M. L. Stiffler.)

four or five years are not the chances of recovery lessened a great deal, Doctor?

A. The chances of recovery are lessened some, not necessarily a great deal.

Q. Your statement a few minutes ago, Doctor, that if he were denied this compensation, denied this insurance, he would likely recover; in what length of time would he likely recover?

A. Understand that is an assumption. I cannot say that for certain.

Q. In this case, the evidence shows he has been trying to get this and been denied for five years; then why hasn't he recovered after being denied so long?

A. Because always the hope held out he is still going to get it. That hope is not always held out to him. There will be an end to it some time.

Q. He would die, that would be the only thing that would make him totally and permanently disabled under that assumption, is it not, Doctor?

A. No, sir.

Q. What would happen?

A. The activities of the Bureau will change within a few years, and that will be handled entirely differently. That is not what I figure will ultimately cure him of his disability, no sir, it is just a guess that he might recover from this disease. It is a reasonable certainty that he will recover. There is a slight possibility that he will completely recover. I think it is reasonable to suppose that he will recover from it. It is unreasonable to suppose that he

(Testimony of M. L. Stiffler.)

will not recover from it. It is unreasonable to figure that he will not recover.

Redirect Examination by Mr. HIGGINS.

The testimony of Dr. Josewich would also aid me in arriving at my [184] diagnosis of this case, when he testified that the defendant had no tuberculosis and exhibited no neurosis, and three days later became neurotic when he learned he was not to get a rating as a tubercular patient. Frequently much hospitalization causes that state of mind, also the solicitude of friends, as described by Dr. Little in his testimony. That is, those people in Kalispell, who were striving to get compensation and insurance for this plaintiff, also the solicitude of friends in Great Falls; the solicitude as shown by the testimony of Mr. Carey that he undoubtedly felt for the plaintiff.

TESTIMONY OF L. A. LAWLER, FOR DEFENDANT.

Thereupon L. A. LAWLER, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination by Mr. HIGGINS.

I am the same Mr. Lawler who has previously testified in this action. I have examined the files and records in the office of the United States Veterans' Bureau in the case of Herbert McGovern vs. United States of America. I am familiar with the condition of the War Risk Insurance of Mr.

(Testimony of L. A. Lawler.)

McGovern. I know that it has been and still is in a state of lapse.

Q. You know, do you, from your inspection of those records, when payment of premiums last ceased and when the insurance is asserted to have lapsed by virtue of nonpayment of premiums?

Mr. MOLUMBY.—I think it is all admitted in the pleadings.

A. In December, 1918; thereafter McGovern again reinstated his insurance, effective as of March 1, 1919, and paid premiums to include July, 1919; thereafter, McGovern or no other person in his behalf made further payment of premiums and his insurance lapsed at midnight, August 31, 1919. [185]

Mr. HIGGINS.—I would like to have the case reopened on the part of the defense for the introduction of a certified copy of Bureau of War Risk Insurance Bulletin No. 1, marked Exhibit 20 for defendant.

The COURT.—It may be filed.

Note: This bulletin is designated "Bulletin No. 1," issued by William C. De Lanoy, Director of the Bureau of War Risk Insurance in the Treasury Department, under date of October 15, 1917, entitled, "Terms and Conditions of Soldiers' and Sailors' Insurance," pursuant to the provisions of Section 402 of an act "To amend 'an act to authorize the establishment of a Bureau of War-Risk Insurance in the Treasury Department,' approved September 2, 1914, and for other purposes," approved October 6, 1917.

Mr. HIGGINS.—Also a certified copy of Treasury Decision 20, a regulation, marked Exhibit No. 21 for defendant.

The COURT.—They may be filed. They are not evidence; they may be brought to the Court's notice.

DEFENDANT'S EXHIBIT XXI.

UNITED STATES OF AMERICA.

UNITED STATES VETERANS' BUREAU.

October 4, 1922.

PURSUANT to Section 882 of the Revised Statutes I hereby certify that the annexed photostatic copy of T. D. 20 W. R. dated March 9, 1918, signed William C. DeLanoy, Director, Bureau of War Risk Insurance, is a true copy of the original on file in this Bureau.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States Veterans' Bureau to be affixed, on the day and year first above written.

[Seal] C. R. FORBES,

Director of the United States Veterans' Bureau.

[186]

(T. D. 20 W. R.)

Total Disability.

Regulation No. 11 relative to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent.

TREASURY DEPARTMENT.
BUREAU OF WAR RISK INSURANCE.
Washington, D. C., March 9, 1918.

By virtue of the authority conferred in Section 13 of the War Risk Insurance Act the following regulation is issued relative to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent:

Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability.

"Total disability" shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on the ground that the insured has become totally and permanently disabled, has recovered the ability to continuously follow any substantially gainful occupation the payment of installments of insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue.

WILLIAM C. De LANOY,
Director.

Approved:
W. G. McADOO,
Secretary of the Treasury. [187]

Thereafter, on July 9, 1923, defendant submitted and filed its motion for specific findings of fact, separately stated, in words and figures following, to wit:

In the District Court of the United States, District of Montana, Great Falls Division.

HERBERT McGOVERN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

MOTION ON BEHALF OF DEFENDANT FOR SPECIFIC FINDINGS OF FACT SEPARATELY STATED.

Comes now the defendant, United States of America, and, deeming the following facts established by the evidence in this case, moves the Court to find said facts, and separately and specifically as hereinafter set forth:

I.

That Herbert McGovern, the plaintiff herein, entered the Naval Forces of the United States September 5, 1917, and on March 5, 1918, made application for and was granted Ten Thousand Dollars ($10,000.00) term insurance, payable as provided in the Act of Congress approved October 6, 1917, to the insured during permanent total disability, and from and after his death to his designated beneficiary. The provisions of the War Risk Insurance

Act, together with all subsequent amendments thereto, Bulletin Number 1, issued October 15, 1917, Treasury Decision Number 20, issued March 8, 1918, and all other rules and regulations promulgated pursuant to the authority conferred upon the Director of the Bureau of War Risk Insurance, constituted the terms of the plaintiff's contract of insurance with the United States of America. [188]

II.

That the premium due upon the plaintiff's Ten Thousand Dollar ($10,000.00) term insurance was Six and 60/100 Dollars ($6.60) per month, and it was expressly provided in Bulletin Number 1 that insurance would lapse for nonpayment of premium thirty-one days after an unpaid premium became due .

III.

That the monthly premiums due upon the plaintiff's insurance from March 5, 1918, to include October, 1918, were deducted from his active service pay under an authorization contained in his application for insurance. This authorization for deduction of monthly premiums expired upon the plaintiff's discharge from the Naval Forces of the United States, on October 27, 1918, and thereafter no further deductions of premiums were made under such authorization. The plaintiff did not pay, or cause to be paid, nor was there paid by the plaintiff or any person in his behalf, the premium due for the month of November, and by reason of such failure to pay premiums the plaintiff's insurance lapsed at

the expiration of the thirty-one day grace period, on December 31, 1918.

IV.

That on March 22, 1919, the plaintiff addressed a communication to the bureau, stating that he was then in as good health as he was at the time of his discharge, on October 17, 1918, and enclosed a money order in the sum of Thirty-nine and 60/100 Dollars ($39.60) for the purpose of reinstating his insurance. The plaintiff's application for reinstatement was granted, and the Thirty-nine and 60/100 ($39.60) Dollars was applied in payment of premiums to include July, 1919. The plaintiff did not pay, or cause to be paid, any premiums due upon his insurance for months subsequent to July, 1919, nor were there paid any premiums due upon his insurance for months subsequent to July, 1919, and by reason of such failure to continue to pay premiums, his insurance again lapsed for nonpayment of premiums, at the expiration of the thirty-one day grace period, on August 31, 1919, and became null and void after that date. [189]

V.

That the records of the Bureau of Medicine and Surgery of the Navy Department show that the plaintiff was admitted to the Naval Hospital, New London, Conn., June 26, 1918, and was found to be suffering with tuberculosis. He was later transferred to Fort Lyons, Colorado, and from there to the Modern Woodmen's Sanatorium, Colorado Springs, Colorado, where he was discharged from the Naval Service of the United States.

VI.

That on April 26, 1919, the plaintiff filed claim with the Bureau of War Risk Insurance for compensation (not insurance) because of physical disability which he alleged resulted from salt water getting in the storage batteries and engine-room gas. Reports of physical examinations made by physicians designated by the Bureau of War Risk Insurance, now known as the United States Veterans' Bureau, on September 1, 1919, January 1, 1920, February 25, 1920, May 3, 1920, December 9, 1920, December 17, 1920, February 7, 1921, May 19, 1921, September 20, 1921, and December 19, 1922, showed that the plaintiff's sputum was negative for tubercle bacilli, and that his tubercular process had been arrested or quiescent since his release from Naval Service.

VII.

That the plaintiff did not allege that he was suffering with any nervous or mental disease or disorder at the time of his discharge from the Naval Forces of the United States, nor was any evidence of any nervous or mental disease or disorder discovered in the course of his physical examinations prior to May 3, 1920. The report of physical examination dated May 3, 1920, signed by F. B. Nather, Surgeon, Spokane, Washington, states that plaintiff complained that his nerves were all shot to pieces, that he was weak and could hardly walk. His physical examination at that time showed that his head, neck and abdomen were in normal condition. Attached to F. B. [190] Nather's report of examination dated May 3, 1920, there was a report

of neuro-psychiatric examination made by George E. Price, M. D., a neuro-psychiatrist of Spokane, Washington, which stated that the plaintiff was suffering with hysteria. Dr. Price recommended that work would be the best form of treatment for this particular case, but as this would undoubtedly meet with strenuous opposition, he suggested that plaintiff be sent to a neurological center for treatment.

VIII.

That after examination of the plaintiff on November 12, 1920, Dr. W. S. Little of Kalispell, Montana, reported that he could find no evidence of physical or mental disorder, that the plaintiff was able to resume his former occupation, and that he could see no reason for plaintiff getting any compensation whatever.

IX.

That on March 12, 1921, Loy J. Molumby, Great Falls, Montana, was appointed as guardian of plaintiff, as an incompetent person, by the Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, but the said Loy J. Molumby was discharged as such guardian on August 11, 1921, upon the advice of Dr. Michaels, a neuro-psychiatrist of the United States Veterans' Hospital, No. 68, Minneapolis, Minnesota, who reported that the plaintiff was not incompetent.

While there is some evidence which indicates that the plaintiff has no real mental or nervous trouble and that he is merely pretending to have such disability, for the purpose of securing compensation and

insurance from the United States Veterans' Bureau, the plaintiff has been given the benefit of the doubt by the bureau, and his malady diagnosed variously as constitutional psychopathic inferiority, without psychosis, but with emotional instability, psychoneurosis, pensionitis, and compensation hysteria. [191]

X.

That the experts called by the defendant to testify in this case stated that in their opinion the plaintiff was probably suffering with hysteria superinduced by anxiety to obtain compensation and insurance, and that this malady was not of a permanent nature, such as would warrant a reasonable expectation that it would totally disable the plaintiff during the remainder of his life.

XI.

That under the Medical Rating Schedule approved by the Director of the United States Veterans' Bureau, July 15, 1921, hysteria and kindred nervous diseases are classified as temporary disabilities, and as not warranting a finding of permanent total disability for the purpose of paying insurance benefits.

XII.

That upon the evidence secured by physical examination and other evidence presented by or in behalf of the plaintiff, the director of the Veterans' Bureau found that the plaintiff was not shown to be permanently and totally disabled on or before August 31, 1919, the date upon which his insurance lapsed for nonpayment of premiums.

XIII.

That there is evidence in the plaintiff's compensation and insurance file in the United States Veterans' Bureau, upon which the director of the said bureau could reasonably find that the plaintiff was not permanently or totally disabled on or before August 31, 1919.

XIV.

That at the trial of this action, the plaintiff did not attempt to offer any evidence that the finding of the director of the United States Veterans' Bureau was unreasonable and not founded on sufficient facts to reasonably warrant such a finding. [192]

XV.

That the plaintiff did, however, offer evidence of his physical condition which was not shown to have been previously submitted to the United States Veterans' Bureau, including the testimony of himself, taken by deposition, of Loy J. Molumby, F. L. Carey of Great Falls, Montana, Rev. William P. Callaghan, Herbert H. McGovern, Sr., Lola Veller, Dr. Dora Walker, W. S. Bentley, Dr. Thomas Walker and Dr. Vidal, all of which was allowed to be introduced in evidence over the objection of the defendant for the reason that such evidence had not previously been submitted to the United States Veterans' Bureau, and, as it had never been acted on by the director of the said Bureau, could not constitute the basis of a disagreement whereon suit might be brought under the provisions of Section 13 of the War Risk Insurance Act (40 Stat. 555),

and for the further reason that all of such evidence concerned the plaintiff's physical condition subsequent to August 31, 1919, the date upon which his insurance lapsed.

XVI.

Neither from the evidence submitted to the Bureau or from any testimony submitted at the trial of this case has it been shown that the plaintiff, on or before the 31st day of August, 1919, or at any time, or at all, was suffering from tuberculosis or nervous or mental disorder, or any disease whatsoever, so as to disable plaintiff permanently and totally from continuously carrying on any gainful occupation, but that the testimony does show, that if plaintiff ever suffered from tuberculosis, the same was at all times above mentioned arrested, and in a quiescent and not an active state, and any disorder that plaintiff may be suffering with at present has been diagnosed by all the doctors testifying in this case, as hysteria, which is curable, and which condition is not shown to have developed to a total degree of disability until long after the 31st day of August, 1919.

L. A. LAWLER,
Attorney, United States Veterans' Bureau.
RONALD HIGGINS,
Assistant United States Attorney, District of Montana. [193]

Thereafter, and on July 18, 1923, plaintiff submitted and filed his findings of fact and conclusions of law, in the words and figures following, to wit:

In the District Court of the State of Montana, in and for the District of Montana.

HERBERT H. McGOVERN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Comes now the plaintiff in the above-entitled action and respectfully requests the Court to make the following findings of fact and conclusions of law in this action:

1.

That the plaintiff is now and has been for a period of more than five years prior to the institution of the action, a resident of the State of Montana, in the District of Montana.

2.

That on or about the 19th day of June, 1917, the plaintiff enlisted in the Naval Forces of the United States of America and that down to and including the 17th day of October, 1918, he served the Government of the United States of America as a first class machinist in its navy and was, during all of said time employed in active service during the war with Germany and its allies.

3.

That on or about the 5th day of March, 1918, the plaintiff made application for insurance under the

provisions of Article Four of the War Risk Insurance Act of Congress, in the sum of Ten Thousand Dollars; that he was [194] duly issued a certificate of his compliance with said War Risk Insurance Act and that thereafter, during the term of his service in the United States Navy there was deducted from his pay, for said services by the United States Government, monthly premiums upon said insurance and that said insurance was in force and effect down to and including the 31st day of October, 1918.

4.

That during plaintiff's period of service with the defendant during the war with Germany and its allies, and while acting in line of duty of such service, the plaintiff contracted a disability and suffered an injury which have ever since the 17th day of October, 1918, continuously rendered and still render him unable to follow any substantially gainful occupation, and the disabilities resulting from said disease and from said injury are of such a nature that they are reasonably certain to continue throughout the lifetime of the plaintiff; that by reason of said disabilities plaintiff is now and has been ever since the 17th day of October, 1918, totally and permanently disabled.

5.

That the plaintiff made application to the Veterans' Bureau and the director thereof and through the Bureau of War Risk Insurance and the director thereof, for the benefits of the War Risk Insurance Act for total permanent disability and the Veter-

ans' Bureau and the Bureau of War Risk Insurance and the directors thereof refused to pay the claimant the amount provided for total permanent disability and disputed the claim and right of the plaintiff to said benefits and have refused to grant the plaintiff said benefits under said Insurance Act.

6.

CONCLUSIONS OF LAW.

1st. That the defendant is indebted to the plaintiff in the sum of Fifty-seven Dollars and Fifty Cents ($57.50) per month from and after the 17th day of October, 1918.

2d. That the plaintiff is entitled to judgment against the defendant herein. [195]

Respectfully submitted,

LOY J. MOLUMBY,
J. M. GAULT and
CHAS. DAVIDSON,
Attorneys for Plaintiff.

Thereafter, and on the 19th day of July 1923, defendant submitted and filed its objections to findings of fact requested by plaintiff and request for findings of fact heretofore requested by defendant, in words and figures following, to wit:

In the District Court of the United States, District of Montana, Great Falls Division.

HERBERT H. McGOVERN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

DEFENDANT'S OBJECTIONS TO FINDINGS OF FACT REQUESTED BY PLAINTIFF AND REQUEST FOR FINDINGS OF FACT HERETOFORE REQUESTED BY DEFENDANT.

Comes now the defendant and objects to plaintiff's requested findings of fact:

1.

Objected to as contrary to the evidence respecting residence of plaintiff.

2.

No objection.

3.

Objected to as ambiguous, indefinite, uncertain, misleading, and unsupported by, and contrary to, the evidence, in failing to fully state the facts, in this, that after a lapse of plaintiff's insurance, he made application for and the same was reinstated March 22, 1919, and that said insurance again lapsed on July 31, 1919. [196]

4.

Objected to as ambiguous, indefinite, uncertain, misleading, and unsupported by, and contrary to,

the evidence, in not specifying the character or nature of the disability of plaintiff, and further, as contrary to the evidence which is to the effect that plaintiff is not permanently and totally disabled, and if disabled at all, such disability results only from hysteria, a temporary and curable ailment, and it being established that such is of service origin and was acquired while the insurance of plaintiff was still in full force and effect.

5.

Objected to as ambiguous, indefinite, uncertain, misleading, and unsupported by, and contrary to, the evidence, in failing to set forth the character the nature of the disability of plaintiff, by virtue of which he claimed the benefits under his contract of insurance, and the kind and character of proof in support of his claim that was submitted to the Bureau, and on what date the same was submitted to show permanent and total disability, if any.

WHEREFORE, defendant renews the request heretofore made to the Court to adopt the findings of fact requested by defendant.

RONALD HIGGINS,
Assistant United States Attorney, District of Montana.

Thereafter, and on the 24th day of July, 1923, plaintiff submitted and filed his objections to defendant's requested findings of fact, in words and figures following, to wit:

In the District Court of the United States, in and for the District of Montana, Great Falls Division. [197]

HERBERT H. McGOVERN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S REQUESTED FINDINGS OF FACT.

Comes now the plaintiff in the above-entitled action and objects to the defendant's requested findings of fact as follows:

1.

No objections.

2.

No objections.

3.

No objections.

4.

No objections.

5.

No objections.

6.

Objected to on the grounds that it is a mere recital of evidence offered by the defendant, which evidence was in itself inadmissible constituting nothing more than a mere self-serving declaration on the part of the defendant through its agents and is contrary to the weight of evidence introduced in-

asmuch as the defendant's rating themselves, show that plaintiff was rated totally disabled during all the time mentioned in defendant's requested finding of fact No. 6.

7.

Objected to on the grounds that the facts therein recited are immaterial and irrelevant in this case as the shortcomings of the defendant's [198] agents can in no way be pleaded as a defense in this action and the evidence clearly shows that the plaintiff was suffering from a nervous disorder prior to his discharge and ever since his discharge from the United States Navy and objected to on the further grounds that it is a mere recital of some of the evidence offered on behalf of the defendant which is contradicted by other evidence of greater weight offered by the defendants themselves as the ratings of the defendants, based upon the findings of fact of these other doctors clearly show that he was totally disabled during all the time mentioned in defendant's proposed findings of fact No. 7 and clearly shows that a mental and nervous disorder was part of the basis of those ratings.

8.

Objected to as being a mere recital of part of the evidence introduced on behalf of the defendant which is contradicted by other evidence offered on behalf of the defendant inasmuch as not less than two weeks thereafter the plaintiff was examined by doctors purporting to be experts on the subject, at the request of the defendant, who were in the employ of the defendant, whose testimony is before the

Court, and who found all the things Dr. Little failed to find. The shortcomings or lack of knowledge of Dr. Little cannot be the basis of a finding of fact which is contradicted by the defendant's own testimony.

9.

Objected to on the grounds that it is immaterial and irrelevant and is a mere recital of some of the evidence which is contradicted by the great weight of evidence introduced as the defendant's documentary evidence shows that plaintiff was totally and permanently disabled all the time recited in proposed finding of fact No. 9.

10.

Objected to on the grounds that it is contrary to the great weight of evidence in this testimony as the experts called on behalf of the defendant are doctors who never, in their life, examined the plaintiff or had an opportunity [199] to observe his condition, whereas the experts called on the part of the plaintiff and who are agents of the defendant and who are working for the defendant and who did have an opportunity to observe his condition daily for months, gave quite a different opinion.

11.

Objected to on the grounds that it is absolutely immaterial as the medical rating schedule proved by the Director of the Veterans' Bureau, are in no way binding on this Court.

12.

Objected to on the grounds that it is absolutely immaterial as the findings of the director of the

Veterans' Bureau are in no way binding on this Court and has no evidential value whatsoever in this action.

13.

Objected to on the grounds that it is absolutely immaterial in that the findings of the director of the Veterans' Bureau are in no way binding on this Court and has no evidential value in this action whatsoever.

14.

Objected to on the grounds that it is absolutely immaterial inasmuch as this is not an action seeking to *mandamus* the director of the Veterans' Bureau but is an action brought under the War Risk Insurance Act.

15.

Objected to on the grounds that it is absolutely immaterial inasmuch as this is not an action seeking to *mandamus* the director of the Veterans' Bureau but is an action brought under the War Risk Insurance Act.

16.

Objected to on the grounds that it is absolutely contrary to the weight of evidence introduced at the trial of the action inasmuch as the documentary evidence offered as admissions on the part of the Government show that the defendant has been totally and permanently disabled ever since his discharge [200] from the United States Navy from a combination of disabilities, to wit, of tuberculosis and a nervous and mental disorder and because the great weight of testimony offered, not only at this

trial but also to the Veterans' Bureau, is to the same effect.

WHEREFORE, plaintiff renews his request heretofore made to this Court that they adopt the findings of fact heretofore requested by him.

Dated this the 21st day of July, 1923.

CHAS. DAVIDSON,
J. M. GAULT and
LOY J. MOLUMBY,
Attorneys for Plaintiff.

Thereafter, and on November 26, 1923, the decision of the Court was duly filed herein, in the words and figures following, to wit:

United States District Court, Montana.

No. 948.

McGOVERN
vs.
UNITED STATES.

DECISION.

This action is upon an insurance policy issued by defendant to plaintiff pursuant to Sec. 400, Act Oct. 6, 1917, 40 Stat. 409. Plaintiff alleges he is of total permanent disability within said statute. This, defendant denies, and pleads lapse of the policy in August, 1919, by reason of nonpayment of the premiums. A large part of the evidence consists of reports to the Bureau of War Risk Insurance and to its successor, the Veterans' Bureau, by defendant's doctors, repeatedly examining plaintiff

therefor, and of determinations and actions upon them by the Bureaus. These Bureaus are vested with statutory authority to examine, report, determine and act in all matters relating to administration of the statute whether in respect to its compensatory or insurance aspect, and hence all thereof are public, official, judgments of a special tribunal, and competent evidence. [201]

See Evanston vs. Gunn, 99 U. S. 666.
McQuerny vs. U. S., 143 Fed. 736.

That all thereof may have been more in relation to compensation than to insurance is immaterial; for the import of the term "total permanent disability," is like in both aspects. Incidentally, the Bureaus' determinations are not final, the statute, Sec. 405, providing that in event of disagreement between the Bureau and insured, action like this at bar may be brought. Therein, the whole matter is at large and open to contention, the proceeding in no sense a review of the Bureau's judgment. The statute prescribing no procedure, the rule as usual is that the action will be assimilated to like actions, here, against the United States, and so in accordance with the Tucker Act.

Again adverting to the evidence, it is that in 1917 plaintiff enlisted in defendant's navy and the policy issued. In June 1918, he entered defendant's hospital, was diagnosed as of chronic pulmonary tuberculosis and in October of that year, upon his insistence was discharged "by reason of physical disability incurred in line of duty." Intermittently for the greater part of near three

years thereafter he was treated in hospitals and sanitariums of defendant and others, and during this interval and thereafter occurred the examinations, reports, determinations and actions aforesaid. From these it appears in the main and with little dissent, that subsequent to the discharge plaintiff has given little evidence of tuberculosis, but has been and is subject to chronic bronchitis, fainting spells, extreme nervousness, hysteria, psychosis, maniac depressive, is of constitutional psychopathic inferiority with superimposed emotional irritability and paranoid trend, is unable to make social adjustment, is disabled to care for self, to follow his vocation of mining engineer or any other vocational training, and reasonably likely to be for an indefinite period. The Bureaus rated him variously from no disability to temporary total from discharge to May 1921 and perhaps later, and in March 1923 the Bureau's Board of Appeals rated him of disability "permanent total [202] on and after Oct. 10, 1922." Whether or not this last is or has become final, does not appear.

The other evidence is more or less corroborative of the foregoing, and tends to support the contention that at all times subsquent to discharge plaintiff has been and now is totally and permanently disabled. Some of defendant's witnesses, however, are of the view that this condition is not permanent in the sense that he may never recover from it, that it is largely due to hysteria and anxiety in respect to insurance and otherwise, and that this action decided he may recover. To guard against the

consequences of excitement, plaintiff was not present at the trial, and his testimony is presented by deposition subsequently taken. Of this, it is fair to observe it indicates average intelligence at least.

What constitutes total permanent disability within the statutory import of that term, by this Court has been indicated in Law's Case, 290 Fed. 975, and therein also the extreme and mistaken interpretation of the Veterans' Bureau. Adhering to the views of that case, it is believed that the facts and circumstances herein established that plaintiff's case is one of total permanent disability from his discharge thenceforward. This view is fortified by the Bureau's judgment. Despite its error of interpretation, practically from the beginning it has rated him of total disability; and as time passed, examinations repeated and condition unimproved, it at least indicates that its earlier determination of temporariness was mistaken and must yield to the logic of events and to a judgment that his total disability is permanent. With this, the Court agrees. As permanency of any condition (here, total disability) involves the element of time, the event of its continuance during the passage of time is competent and cogent evidence.

At no time since discharge has plaintiff possessed any substantial earning power, and at all said interval it has been and now is reasonably probable his status will thus long continue and for indefinite time. In other words, at all material time he has been and now is of total permanent disability within the [203] statute and Law's case. That

he may recover is based on the hypothesis that once this case ended, his hopes gratified or ended, his disability will likewise be ended; that then his diseased if not perverted mentality and will-power will be asserted to and will effect a cure and will restore the ability he now lacks. This consummation may follow, but that it will is fairly disputable and disputed, and is too conjectural to warrant a judgment that in reasonable probability it will. On the contrary, in all the circumstances the reasonable probability is that it will not, but if it does, only in some long, indefinite and incomputable time. Nonetheless is his disabled status permanent. If he recovers, his disability no longer total and permanent, he will no longer be entitled to insurance payments. That is the statute, sec. 402, 40 Stat. 409; sec. 404, 42 Stat. 155. Nevertheless, until that time arrives if ever, payments by virtue of the contract or policy are his due. The contingency happened and endures upon which they are to be made. It is immaterial that plaintiff's condition is probably due more to congenital defects and hysteria incited by weak yielding to desire for insurance payments, than to war service ailments.

The statute is not limited to disabilities due to war service, but includes any and all, so long as not intentionally self-inflicted. It is also immaterial that no premiums were paid after August, 1919. The policy did not lapse but had matured by reason of prior happening of the event, total

permanent disability. Premiums were no longer due.

Plaintiff is entitled to judgment and it is rendered as prayed, together with ten per cent for attorney fees.

Nov. 26, 1923.

BOURQUIN, J.

Thereafter, and on the 1st day of December, 1923, the Court made findings of fact and conclusions of law, by approving and adopting findings of fact and conclusions of law submitted by plaintiff on the 18th day of July, 1923, except for changes incorporated in paragraph 4 thereof, said findings and conclusions so adopted and approved by the Court, being in the words and figures following, to wit: [204]

In the District Court of the State of Montana, in and for the District of Montana.

HERBERT H. McGOVERN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Comes now the plaintiff in the above-entitled action and respectfully requests the Court to make

the following findings of fact and conclusions of law in this action:

1.

That the plaintiff is now and has been for a period of more than five years prior to the institution of the action, a resident of the State of Montana, in the District of Montana.

2.

That on or about the 19th day of June, 1917, the plaintiff enlisted in the naval forces of the United States of America and that down to and including the 17th day of October, 1918, he served the Government of the United States of America as a first-class machinist in its navy and was during all of said time employed in active service during the war with Germany and its allies.

3.

That on or about the 5th of March, 1918, the plaintiff made application for insurance under the provisions of Article Four of the War Risk Insurance Act of Congress, in the sum of Ten Thousand; that he was duly issued a certificate of his compliance with said War Risk Insurance Act and that thereafter, during the term of his service in the United States Navy there was deducted from his pay, for said services by the United States Government, monthly premiums [205] upon said insurance and that said Insurance was in force and effect down to and including the 31st day of October, 1918.

4.

That during plaintiff's period of service with the

defendant during the war with Germany and its allies, and while acting in line of duty of such service, the plaintiff contracted a disability and suffered an injury which have ever since the 17th day of October, 1918, continuously rendered and still render him practically unable to follow any substantially gainful occupation to reasonable reward, and the disabilities resulting from said disease and from said injury are of such a nature that they are reasonably likely to continue for a long, incomputable and indefinite time; that by reason of said disabilities plaintiff is now and has been ever since the 17th day of October, 1918, totally and permanently disabled.

5.

That the plaintiff made application to the Veterans' Bureau and the Director thereof and through the Bureau of War Risk Insurance and the Director thereof, for the benefits of the War Risk Insurance Act for total permanent disability and the Veterans' Bureau and the Bureau of War Risk Insurance and the Directors thereof refused to pay the claimant the amount provided for total permanent disability and disputed the claim and right of the plaintiff to said benefits and have refused to grant the plaintiff said benefits under said Insurance Act.

6.

CONCLUSIONS OF LAW.

1st. That the defendant is indebted to the plaintiff in the sum of Fifty-seven Dollars and Fifty

cents ($57.50) per month from and after the 17th day of October, 1918.

2d. That the plaintiff is entitled to Judgment against the defendant herein. [206]

Respectfully submitted,
LOY J. MOLUMBY,
J. M. GAULT,
CHAS. DAVIDSON,
Attorney for the Plaintiff.

Approved, adopted and made December 1, 1923.
BOURQUIN, J.

ORDER SETTLING AND ALLOWING BILL OF EXCEPTIONS.

AND NOW, in furtherance of justice, and that right may be done, the defendant, the United States of America, tenders and presents the foregoing as its bill of exceptions in this case to the action of the Court, and prays that the same may be settled and allowed, and signed and sealed by the court and made a part of the records and the same is accordingly done this 7th day of Feb. 1924.

BOURQUIN,
Judge of the District Court of the United States for the District of Montana. [207]

Service of the foregoing bill of exceptions acknowledged and copy received this —— day of January, 1924.

_____,
_____,
Attorneys for Plaintiff.

Received by the clerk for delivery to the Court this —— day of January, 1924.

_____,

Clerk of the United States District Court for the District of Montana.

Filed this —— day of January, 1924.

_____,

Clerk of the United States District Court for the District of Montana.

Filed Feb. 7, 1924. C. R. Garlow, Clerk.

Thereafter, and on February 14, 1924, praecipe for transcript of record was filed herein, being in the words and figures following, to wit: [208]

In the District Court of the United States, District of Montana, Great Falls Division.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

HERBERT McGOVERN,
Defendant in Error.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to a writ of error allowed in the above-entitled cause, and to incorporate in such transcript of record, the following papers, to wit:

1. Amended complaint.
2. Summons.
3. Answer to amended complaint.
4. Motion for judgment by defendant.
5. Judgment.
6. Bill of exceptions.
7. Petition for writ of error.
8. Assignment of errors.
9. Order allowing writ of error.
10. Writ of error.
11. Citation on writ of error.
12. Copy of praecipe for transcript.
13. Acknowledgment by defendant in error of service of all papers on writ of error. [209]
14. Any other file, paper or assignment required to be incorporated in a transcript of the record herein, under the practice of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 12th day of February, 1924.

JOHN L. SLATTERY,
United States Attorney,
RONALD HIGGINS,
W. H. MEIGS,
Assistant United States Attorneys,
Attorneys for Plaintiff in Error.

Service accepted this 12th day of February, 1924.

LOY J. MOLUMBY and
CHAS. DAVIDSON,
Attorneys for Defendant in Error.

Filed Feb. 14, 1924. C. R. Garlow, Clerk. By H. H. Walker, Deputy. [210]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of two hundred and ten pages, numbered consecutively from one to 210, inclusive, is a full, true and correct transcript of the record and proceedings in said cause, and of the whole thereof, required to be incorporated therein by praecipe filed, as appears from the original records and files in said court, in my custody, as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages, the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Ninety-two and no/100 ($92.00) Dollars, and have been made a charge against the United States.

WITNESS my hand and the seal of said court this 21st day of February, A. D. 1924.

[Seal] C. R. GARLOW,
Clerk, United States District Court, District of Montana.

By H. H. Walker,
Deputy. [211]

[Endorsed]: No. 4202. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Plaintiff in Error, vs. Herbert H. McGovern, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana,

Filed February 25, 1924.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 4202

United States Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

HERBERT H. McGOVERN, JR.,
Defendant in Error.

WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF ON BEHALF OF THE UNITED STATE OF AMERICA, PLAINTIFF IN ERROR.

JOHN L. SLATTERY,
United States Attorney.
RONALD HIGGINS,
W. H. MEIGS,
Assistant United States Attorneys.
Helena, Montana.
L. A. LAWLOR,
Attorney, U. S. Veterans' Bureau, of Counsel,
Washington, D. C.
Attorneys for the United States of America,
Plaintiff in Error.

NAEGELE PRINTING CO., HELENA, MONT

No. 4202

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Plaintiff in Error,

v.

HERBERT H. McGOVERN, JR.,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

To recover on his contract of War Risk Insurance issued under the War Risk Insurance Act and acts supplemental thereto, defendant in error, herein called the petitioner, instituted action thereon against the plaintiff in error, herein called the Government, by amended complaint, August 4, 1922. (Tr. p. 4).

For cause of action and grounds of recovery, petitioner alleged his permanent and total disability received while serving in the Navy of the Government dating from October 17, 1918, and resulting from tuberculosis and neuro psychosis. (Tr. pgs. 4, 5, 6.)

In answer the Government denied that petitioner was permanently and totally disabled within the meaning and intent of the War Risk Insurance Act and acts supplemental thereto and alleged that petitioner's contract of insurance lapsed December 1, 1918, by reason of non-payment of premiums thereon. (Tr. p. 11.)

The Government further alleged that petitioner reinstated his insurance in March, 1919, but allowed the same to lapse August 31, 1919, by reason of non-payment of premiums and that thereafter his insurance was not in force and effect. No replication was filed by petitioner. (Tr. pgs. 10, 11.)

Motion for trial without jury filed was granted by the court.

The cause was tried June 27, 1923, according to the provisions of the Tucker Act of March 3, 1887 (24 Stat. 506), and amendments thereto, Act of March 3, 1911, Chapter II, Section 24, paragraph 20, U. S. Comp. Stat. 1916, sec. 991. (Tr. pgs. 30, 31).

The following certificate of insurance issued by the Government under the War Risk Insurance

Act and acts supplemental thereto to the petitioner was introduced. (Tr. p. 80).

APPLICATION FOR INSURANCE.

1941583 010575

My full name is Herbert Hugh McGovern, Jr.
Home Address, Oak Grove, Oregon.
Date of birth, February 22, 1893. Age, 25.
Date of last enlistment or entry into active service, Sept. 5th, 1917.

I hereby apply for insurance in the sum of $10,000 payable as provided in the Act of Congress approved October 6, 1917, to myself during permanent total disability and from and after my death to the following persons in the following amounts:

Relationship to me	Name of Beneficiary (Given) (Middle) (Last Name)	Post Office Address	Amount of Insurance for Each Beneficiary
Father	Herbert Hugh McGovern, Sr.	Oak Grove Oregon.	$10,000

In case any beneficiary die or become disqualified after becoming entitled to an installment but before receiving all installments, the remaining installments are to be paid to such person or persons within the permitted class of beneficiaries as may be designated in my last will and testament, or in the absence of such will, as would under the laws of my place of residence be entitled to my personal property in case of intestacy.

I authorize the necessary monthly deductions from my pay, or if insufficient, from any deposit with the United States, in payment of the premiums as they become due, unless they be otherwise paid.

If this applications is for less than $4,500 insur-surance, I offer it and it is to be deemed made as of the date of signature.

If this application is for lessthan $4,500 insurance and in favor of wife, child, or widowed mother, I offer it and it is to be deemed made as of February 12, 1918.

If this application is for less than $4,500 and in favor of some person or persons other than wife, child, or widowed mother, I offer it and it is to be deemed made as of (Date of signature—February 12, 1918). Strike out whichever is not wanted.

Note.—If in the last paragraph you strike out "Date of signature," leaving "February 12, 1918." the law gives you $25 a month for life in case of permanent total disablement occurring prior to such date and the same monthly amount to your widow, child, or widowed mother for not to exceed 240 months less payments made to you while living, but nothing to anyone else in case of your death before such date, and the insurance for the designated beneficiary other than wife, child, or widowed mother is effective only if you die on or after February 12, 1918.

If you strike out "February 12, 1918," leaving

"Date of signature," a smaller insurance both against death and disability takes effect at once, but is payable in case of death to the designated beneficiary.

To whom do you wish policy sent?

(Name) Herbert H. McGovern.

(Address) Oak Grove, Oregon.

Signed at (on board) A. S. S. C. 42 the 5th day of March, 1918.

Sign here: Herbert H. McGovern, Jr., M. M., 1st Cl. USNRF.

Witnessed by: J. E. Carter

Rank: Ensign

Commanding A. S. S. C. 42

On July 9, 1923, the Government submitted a motion for specific findings of fact separately stated in the words and figures following, to wit: (Tr. p. 272)

> "Comes now the defendant, United States of America, and, deeming the following facts established by the evidence in this case, moves the Court to find said facts, and separately and specifically as hereinafter set forth:
>
> I.
>
> "That Herbert McGovern, the plaintiff herein, entered the Naval Forces of the United States September 5, 1917, and on March 5, 1918, made application for and was granted Ten Thousand Dollars ($10,000.00) term in-

surance, payable as provided in the Act of Congress approved October 6, 1917, to the insured during permanent total disability, and from and after his death to his designated beneficiary. The provisions of the War Risk Insurance Act, together with all subsequent amendments thereto, Bulletin Number 1, issued October 15, 1917, Treasury Decision Number 20, issued March 8, 1918, and all other rules and regulations promulgated pursuant to the authority conferred upon the Director of the Bureau of War Risk Insurance, constituted the terms of the plaintiff's contract of insurance with the United States of America.

II.

"That the premiums due upon the plaintiff's Ten Thousand Dollar ($10,000.00) term insurance was Six and 60-100 Dollars ($6.60) per month, and it was expressly provided in Bulletin Number 1 that insurance would lapse for non-payment of premiums thirty-one days after an unpaid premium became due.

III.

"That the monthly premiums due upon the plaintiff's insurance from March 5, 1918, to include October, 1918, were deducted from his active service pay under an authorization contained in his application for insurance. This authorization for deduction of monthly premiums expired upon the plaintiff's discharge from the Naval Forces of the United States,

on October 27, 1918, and thereafter no further duductions of premiums were made under such authorization. The plaintiff did not pay, or cause to be paid, nor was there paid by the plaintiff or any person in his behalf, the premiums due for the month of November, and by reason of such failure to pay premiums the plaintiff's insurance lapsed at the expiration of the thirty-one day grace period, on December 31, 1918.

IV.

"That on March 22, 1919, the plaintiff addressed a communication to the Bureau, stating that he was then in as good health as he was at the time of his discharge, on October 17, 1918, and enclosed a money order in the sum of Thirty-nine and 60-100 Dollars ($39.60) for the purpose of reinstating his insurance. The plaintiff's application for reinstatement was granted, and the Thirty-nine and 60-100 ($39.60) Dollars was applied in payment of premiums to include July, 1919. The plaintiff did not pay, or cause to be paid, any premiums due upon his insurance for months subsequent to July, 1919, nor were there paid any premiums due upon his insurance for months subsequent to July, 1919, and by reason of such failure to continue to pay premiums, his insurance again lapsed for nonpayment of premiums, at the expiration of the thirty-one day grace period, on August 31, 1919, and became null and void after that date.

V.

"That the records of the Bureau of Medicine and Surgery of the Navy Department show that the plaintiff was admitted to the Naval Hospital, New London, Conn., June 26, 1918, and was found to be suffering with tuberculosis. He was later transferred to Fort Lyons, Colorado, and from there to the Modern Woodmen's Sanitorium, Colorado Springs, Colorado, where he was discharged from the Naval Service of the United States.

VI.

"That on April 26, 1919, the plaintiff filed claim with the Bureau of War Risk Insurance for compensation (not insurance) because of physical disability which he alleged resulted from salt water getting in the storage batteries and engine room gas. Reports of physical examinations made by physicians designated by the Bureau of War Risk Insurance, now known as the United States Veterans Bureau, on September 1, 1919, January 1, 1920, February 25, 1920, May 3, 1920, December 9, 1920, December 17, 1920, February 7, 1921, May 19, 1921, September 20, 1921, and December 19, 1922, showed that the plaintiff's sputum was negative for tubercle bacilli, and that his tubercular process "had been arrested or quiescent since his release from Naval Service.

VII.

"That the plaintiff did not allege that he was suffering with any nervous or mental disease or disorder at the time of his discharge from the Naval Forces of the United States, nor was any evidence of any nervous or mental disease or disorder discovered in the course of his physical examinations prior to May 3, 1920. The report of physical examinations dated May 3, 1920, signed by F. B. Nather, Surgeon, Spokane, Washington, states that plaintiff complained that his nerves were all shot to pieces, that he was weak and could hardly walk. His physical examination at that time showed that his head, neck and abdomen were in normal condition. Attached to F. B .Nather's report of examination dated May 3, 1920, there was a report of neuro psychiatric examination made by George E. Price, M. D., a neuro psychiatrist of Spokane, Washington, which stated that the plaintiff was suffering with hysteria. Dr. Price recommended that work would be the best form of treatment for this particular case, but as this would undoubtedly meet with strenuous opposition, he suggested that plaintiff be sent to neurological center for treatment.

VIII.

"That after examination of the plaintiff on November 12, 1920, Dr. W. S. Little of Kalispell, Montana, reported that he could find no evidence of physical or mental disorder, that

the plaintiff was able to resume his former occupation, and that he could see no reason for plaintiff getting any compensation whatever.

IX.

"That on March 12, 1921, Loy J. Molumby, Great Falls, Montana, was appointed as guardian of plaintiff, as an incompetent person, by the Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, but the said Loy J. Molumby was discharged as such guardian on August 11, 1921, upon advice of Dr. Michaels, a neuro psychiatrist of the United States Veterans Hospital, No. 68, Minneapolis, Minnesota, who reported that the plaintiff was not incompetent.

"While there is some evidence which indicates that the plaintiff has no real mental or nervous trouble and that he is merely pretending to have such disability for the purpose of securing compensation and insurance from the United States Veterans Bureau, the plaintiff has been given the benefit of the doubt by the Bureau, and his malady diagnosed variously as constitution psychopathic inferiority, without psychosis, but with emotional instability, psychoneurosis, pensionitis, and compensation hysteria.

X.

"That the experts called by the defendant to testify in this case stated that in their opin-

ion the plaintiff was probably suffering with hysteria superinduced by anxiety to obtain compensation and insurance, and that this malady was not of a permanent nature, such as would warrant a reasonable expectation that it would totally disable the plaintiff during the remainder of his life.

XI.

"That under the Medical Rating Schedule approved by the Director of the United States Veterans Bureau, July 15, 1921, hysteria and kindred nervous diseases are classified as temporary disabilities, and as not warranting a finding of permanent total disability for the purpose of paying insurance benefits.

XII.

"That upon the evidence secured by physical examination and other evidence presented by or in behalf of the plaintiff, the Director of the Veterans Bureau found that the plaintiff was not shown to be permanently and totally disabled on or before August 31, 1919, the date upon which his insurance lapsed for nonpayment of premiums.

XIII.

"That there is evidence in the plaintiff's compensation and insurance file in the United States Veterans Bureau, upon which the Director of the said Bureau could reasonably find that the plaintiff was not permanently

and totally disabled on or before August 31, 1919.

XIV.

"That at the trial of this action, the plaintiff did not attempt to offer any evidence that the finding of the Director of the United States Veterans Bureau was unreasonable and not founded on sufficient facts to reasonably warrant such a finding.

XV.

"That the plaintiff did, however, offer evidence of his physical condition which was not shown to have been previously submitted to the United States Veterans Bureau, including the testimony of himself, taken by deposition, of Loy J. Molumby, F. L. Carey of Great Falls, Montana, Rev. William P. Callaghan, Herbert H. McGovern, Sr., Lola Veller, Dr. Dora Walker, W. S. Bentley, Dr. Thomas Walker and Dr. Vidal, all of which was allowed to be introduced in evidence over the objection of the defendant for the reason that such evidence had not previously been submitted to the United States Veterans Bureau, and, as it had never been acted on by the Director of the said Bureau, could not constitute the basis of a disagreement whereon suit might be brought under the provisions of Section 13 of the War Risk Insurance Act (40 Stat. 555), and for the further reason that all of such evidence concerned the plaintiff's physical

condition subsequent to August 31, 1919, the date upon which his insurance lapsed.

XVI.

"Neither from the evidence submitted to the Bureau or from any testimony submitted at the trial of this case has it been shown that the plaintiff, on or before the 31st day of August, 1919, or at any time, or at all, was suffering from tuberculosis or nervous or mental disorder, or any disease whatsoever, so as to disable plaintiff permanently and totally from continuously carrying on any gainful occupation, but that the testimony does show, that if plaintiff ever suffered from tuberculosis, the same was at all times above mentioned arrested, and in a quiescent and not an active state, and any disorder that plaintiff may be suffering with at present has been diagnosed by all the doctors testifying in this case, as hysteria, which is curable, and which condition is not shown to have developed to a total degree of disability until long after the 31st day of August, 1919."

On July 18, 1923, the petitioned submitted a motion for findings of fact and conclusions of law in the words and figures following, to-wit: (Tr. p. 279, 280)

"Comes now the plaintiff in the above entitled action and respectfully requests the Court to make the following findings of fact and conclusions of law in this action:

1.

"That the plaintiff is now and has been for a period of more than five years prior to the institution of the action, a resident of the State of Montana, in the District of Montana.

2.

"That on or about the 19th day of June, 1917, the plaintiff enlisted in the Naval Forces of the United States of America and that down to and including the 17th day of October, 1918, he served the Government of the United States of America as a first class Machinist in its Navy and was, during all of said time employed in active service during the war with Germany and its allies.

3.

"That on or about the 5th day of March, 1918, the plaintiff made application for insurance under the provisions of Article Four of the War Risk Insurance Act of Congress, in the sum of Ten Thousand Dollars; that he was duly issued a certificate of his compliance with said War Risk Insurance Act and that thereafter, during the term of his service in the United States Navy there was deducted from his pay, for said services by the United States Government, monthly premiums upon said insurance and that said insurance was in force and effect down to and including the 31st day of October, 1918.

4.

"That during plaintiff's period of service with the defendant during the War with Germany and its allies, and while acting in line of duty of such service, the plaintiff contracted a disability and suffered an injury which have ever since the 17th day of October, 1918, continuously rendered and still render him unable to follow any substantially gainful occupation, and the disabilities resulting from said disease and from said injury are of such a nature that they are reasonably certain to continue throughout the life time of the plaintiff; that by reason of said disabilities plaintiff is now and has been ever since the 17th day of October, 1918, totally and permanently disabled.

5.

"That the plaintiff made application to the Veterans' Bureau and the Director thereof and through the Bureau of War Risk Insurance and the Director thereof, for the benefits of the War Risk Insurance Act for total permanent disability and the Veterans' Bureau and the Bureau of War Risk Insurance and the Directors thereof refused to pay the claimant the amount provided for total permanent disability and disputed the claim and right of the plaintiff to said benefits and have refused to grant the plaintiff said benefits under said Insurance Act.

6.

"Conclusions of Law.

1st: That the defendant is indebted to the plaintiff in the sum of Fifty-seven Dollars and Fifty Cents ($57.50) per month from and after the 17th day of October, 1918.

2nd: That the plaintiff is entitled to Judgment against the defendant herein."

On November 26, 1923, the court filed its decision in favor of the petitioner (Tr. p. 289) and thereafter on the first day of December, 1923, made findings of fact and conclusions of law by approving and adopting the findings of fact and conclusions of law submitted by the plaintiff on July 18, 1923, except for changes incorporated in paragraph 4 thereof, said findings and conclusions so adopted and approved by the court being in the words and figures following,to-wit: (Tr. p. 294)

"Comes now the plaintiff in the above entitled action and respectfully requests the Court to make the following findings of fact and conclusions of law in this action.

1.

"That the plaintiff is now and has been for a period of more than five years prior to the institution of the action, a resident of the State of Montana, in the District of Montana.

2.

"That on or about the 19th day of June, 1917, the plaintiff enlisted in the Naval Forces of the United States of America and that down to and including the 17th day of October, 1918, he served the Government of the United States of America as a first class Machinist in its Navy and was, during all of said time employed in active service during the War with Germany and its allies.

3.

"That on or about the 5th day of March, 1918, the plaintiff made application for insurance under the provisions of Article Four of the War Risk Insurance Act of Congress, in the sum of Ten Thousand Dollars; that he was duly issued a certificate of his compliance with said War Risk Insurance Act and that thereafter, during the term of his service in the United States Navy there was deducted from his pay, for said services by the United States Government, monthly premiums upon said insurance and that said Insurance was in force and effect down to and including the 31st day of October, 1918.

4.

"That during plaintiff's period of service with the defendant during the War with Germany and its allies, and while acting in line of duty of such service, the plaintiff contracted

a disability and suffered an injury which have ever since the 17th day of October, 1918, continuously rendered and still render him practically unable to follow any substantially gainful occupation to reasonable reward, and the disabilities resulting from said disease and from said injury are of such a nature that they are reasonably likely to continue for a long, incomputable and indefinite time; that by reason of said disabilities plaintiff is now and has been ever since the 17th day of October, 1918, totally and permanently disabled.

5.

"That the plaintiff made application to the Veterans' Bureau and the Director thereof and through the Bureau of War Risk Insurance and the Director thereof, for the benefits of the War Risk Insurance Act for total permanent disability and the Veterans' Bureau and the Bureau of War Risk Insurance and the Directors thereof refused to pay the claimant the amount provided for total permanent disability and disputed the claim and right of the plaintiff to said benefits and have refused to grant the plaintiff said benefits under said Insurance Act.

6.

"Conclusions of Law.

1st: That the defendant is indebted to the plaintiff in the sum of Fifty-seven Dollars and

Fifty Cents ($57.50) per month from and after the 17th day of October, 1918.

2nd: That the plaintiff is entitled to judgment against the defendant herein."

On December 17, 1923, the court rendered judgment against the Government in the sum of $2,530 (Tr. p. 16).

ASSIGNMENTS OF ERROR.

The following assignments of error are those intended to be urged in this proceeding. (Tr. pgs. 18-23, inc.):

1. The Court erred in finding that plaintiff was permanently and totally disabled within the meaning of the War Risk Insurance Act and acts supplemental thereto.

2. The Court erred in finding that plaintiff was permanently and totally disabled within the meaning and intent of the War Risk Insurance Acts and acts supplemental thereto before August 31, 1919.

3. The Court erred in finding that the plaintiff's contract of insurance, under the War Risk Insurance Act and acts supplemental thereto, did not lapse on August 31, 1919.

4. The Court erred in failing to find that the plaintiff's contract of insurance under the War

Risk Insurance Act and acts supplemental thereto, lapsed on August 31, 1919.

5. The Court erred in finding that plaintiff's contract of insurance, under the War Risk Insurance Act and acts supplemental thereto, matured on August 31, 1919.

6. The court erred in admitting in evidence, over objection of defendant, all exhibits of plaintiff concerning matters arising after August 31, 1919.

7. The Court erred in admitting testimony on behalf of the plaintiff, and over the objection of the defendant, concerning matters arising after August 31, 1919.

8. The Court erred in not restricting testimony on behalf of plaintiff to matters and events on and before August 31, 1919, and such that had been submitted by or on behalf of the plaintiff to the Bureau of War Risk Insurance or to the United States Veterans' Bureau.

9. The Court erred in admitting in evidence the exhibits of plaintiff for a purpose other than to show a basis of disagreement between plaintiff and defendant.

10. The Court erred in admitting, on behalf of plaintiff and over the objection of defendant, tes-

timony on matters never submitted to the War Risk Insurance Bureau of the United States Veterans' Bureau, and which were not and could not be the basis of disagreement.

11. The Court erred in admitting the testimony of F. L. Carey, William P. Callahan, Loy J. Molumby, Lola Beller, Dr. Dora Walker, Dr. J. C. Michael, Dr. Thomas F. Walker, Dr. C. K. Vidal, Herbert H. McGovern, Sr., W. S. Bentley and Herbert H. McGovern, Jr., on behalf of plaintiff and over the objection of defendant.

12. The Court erred in not finding that under the terms of the War Risk Insurance Act and acts supplemental thereto, the determination of the Bureau of War Risk Insurance and the United States Veterans' Bureau, holding plaintiff not permanently and totally disabled is final, and that such determination was not an abuse of the powers granted to the said Bureaus under the said acts.

14. The Court erred in finding that there is no reasonable probability that the plaintiff will recover from any disability or ailment he may be suffering from.

15. The Court erred in finding that an ailment or disease, even though curable, constitutes permanent and total disability of the one afflicted therewith within the meaning and intent of the War Risk Insurance Acts and acts supplemental

thereto, when the one so afflicted has been dispossessed thereby of any substantial earning power, and there is reasonable probability that such disability will continue for an indefinite time.

16. The Court erred in failing to find that plaintiff, if afflicted at all, was afflicted with an ailment or disease that is curable.

18. The Court erred in finding that in the event of disagreement under the provisions of the War Risk Insurance Act and acts supplemental thereto, the whole matter of the insured's disability is at large and open to contention, and the Court is not restricted to a review of the Bureau's judgment.

20. The Court erred in finding that the regulations defining permanent and total disability under the War Risk Insurance Act and acts supplemental therto, as adopted by the Bureau of War Risk Insurance and the United States Veterans' Bureau were in excess of authority.

21. The Court erred in finding that the regulations defining permanent and total disability under the War Risk Insurance Acts and acts supplemental thereto, as adopted by the Bureau of War Risk Insurance and the Director thereof and the United States Veterans Bureau and the Director thereof, were repugnant to and in contravention of the meaning and intent of said acts.

22. The Court erred in failing to find that the War Risk Insurance Act and acts supplemental thereto provide for a special statutory kind of insurance and that the contracts of insurance issued under said acts are not governed by the rules and principles of law governing other kinds of insurance.

23. The Court erred in failing to find and adopt the findings of fact submitted by the defendant.

24. The Court erred in approving and adopting and making findings of fact and conclusions of law, in accordance with such submitted by plaintiff, even with the modifications made by the Court to paragraph 4 thereof.

25. The Court erred in not rendering judgment herein in favor of defendant and against plaintiff, for the reason that the plaintiff's contract of insurance had lapsed for non-payment of premiums and had terminated before commencement of suit, and for the further reason that plaintiff was never permanently and totally disabled while his contract of insurance was in full force and effect.

26. The Court erred in rendering judgment herein in favor of plaintiff and against defendant.

27. The Court erred in entering herein a judgment in favor of the plaintiff and against the defendant.

For Purposes of Orderly Discussion and Because Kindred in Nature and Involving Similar Points These Assignments are Herewith Grouped and Entitled in the Following Sequence.

A. War Risk Insurance Act and note supplemental thereto and the contracts of insurance issued thereunder are not governed by the rules and principles of law governing other kinds of insurance. (Assignment of Error 22) (Tr. p. 22).

B. Regulations defining permanent total disability adopted by the Bureau were not in excess of authority. (Assignments of Error 12, 20 and 21) (Tr. pgs. 20, 22).

C. The Court erred in finding that the petitioner was totally and permanently disabled within the meaning of the War Risk Insurance Act and in failing to find that petitioner's insurance lapsed August 31, 1919. (Assignments of Error 1, 2, 3, 4, 5, 14, 15 and 16) (Tr. pgs. 18, 19, 21).

D. Admission of testimony concerning matters arising after August 31, 1919, was error (Assignments of Error 6, 7, 8 and 11) (Tr. pgs. 19, 20).

E. The Court erred in failing to adopt the findings of fact submitted by the Government and by aaproving and adopting the findings of fact in accordance with such submission by the petitioner. (Assignments of Error 23, 24, 25, 26 and 27). (Tr. pgs. 22, 23).

F. Admission of evidence never submitted to the Bureau was error. (Assignments of Error 9, 10 and 11) (Tr. pgs. 19, 20).

G. The Court erred in reversing the finding of this Bureau to the effect that petitioner did not become permanently and totally disabled on or before August 31, 1919 (Assignments of Error 12 and 18) (Tr. pgs. 20, 21).

ARGUMENT AND BRIEF.

War Risk Insurance Act and Acts Supplemental Thereto and the Contracts of Insurance Issued Thereunder are Not Governed by the Rules and Principles of Law Governing Other Kinds of Insurance.

Assignments of Error—Group A

22. The Court erred in failing to find that the War Risk Insurance Act and acts supplemental thereto provide for a special statutory kind of insurance and that the contracts of insurance issued under said acts are not governed by the rules and principles of law governing other kinds of insurance (Tr. p. 22).

The contract of insurance in this case came into being by Federal Statute (40 Stat. 398-411) known as the War Risk Insurance Act and specifically Article IV thereof (40 Stat. 409-411), and is, therefore, not an ordinary contract of insurance such

as is issued by insurance companies, where the parties concerned are free to exercise their natural rights to contract, but is a special statutory kind of insurance, and its terms and conditions are governed by the act creating it.

Cassarello v. United States (Third Circuit), 297 Fed. 396-398, Affirming 271 Fed. 486.

Watson v. Tarpley, 59 U. S. 517-521, 15 L. ed. 509-510.

Lewis' Sutherland on Statutory Construction, Vol. 2, p. 1314.

This contract is, therefore, a federal contract of insurance and no rights are conferred thereunder save those provided by the War Risk Insurance Act and amendments thereto, the regulations promulgated thereunder, the terms and conditions of the contract of insurance as published by the Director under the statutory authority given him by the War Risk Insurance Act and the application for insurance, all of which constitute the petitioner's contract of insurance in this case.

Helmholz v. Horst, et al, 294 Fed. 417.

Gilman et al v. United States, 294 Fed. 422.

In the case of Helmholz v. Horst, supra, the court stated:

"In order to insure the accomplishment of the beneficial purposes of the War Risk Insurance Act, it was further provided therein that the terms and provisions of such contracts of insurance should be subject in all respects to the provisions of the act or any amendment thereto, and also subject to all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for insurance and the terms and conditions published under authority of the act, should constitute the contract. All of these provisions and conditions were written into the certificate issued to Alfred R. Marshall, and became and are a part of the contract. For this reason subsequent amendments of the War Risk Insurance Act and subsequent regulations affecting this contract, which is still in force, do not impair the obligations of an existing contract, but are in direct conformity with its terms, and in furtherance of its purpose and intent."

The War Risk Insurance Act among other things provides:

"Section 1. (As amended August 9, 1921). The powers and duties pertaining to the office of the Director of the Bureau of War Risk Insurance now in the Treasury Department are hereby transferred to the director, subject to the general direction of the President, and the said office of the Director of the Bureau of War Risk Insurance is hereby abolished. * * *" (42 Stat. 147)

"Section 2. The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes and shall decide all questions arising under this Act except as otherwise provided herein." (42 Stat. 148.)

"Section 13. (As amended May 20, 1918) That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in section five. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director, subject to the general direction of the Secretary of the Treasury. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the

right to benefits of allowance, allotment, compensation, or insurance provided for in this Act, the forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards. * * * *" (40 Stat. 555).

"Section 400. That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Departmnt or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided." (40 Stat. 409)

"Section 402. That the director, subject to the general direction of the Secretary of the Treasury, *shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance.* * * * *" (40 Stat. 615).

Pursuant to the powers conferred in the sections above quoted, on October 15, 1917, the Di-

rector of the Bureau of War Risk Insurance by the direction of the Secretary of the Treasury determined upon and published Bulletin No. 1, containing the full and exact terms and conditions of the contract of insurance to be made under and by virtue of the War Risk Insurance Act. Bulletin No. 1 among other things provides:

> "Premiums shall be paid monthly on or before the last day of each calendar month and will, unless the insured otherwise elects in writing, be deducted from any pay due him/her from the United States or deposit by him/her with the United States, and, if so to be deducted, a premium when due will be treated as paid, whether or not such deduction is in fact made, if upon the due date the United States owe him/her on account of pay or deposit an amount sufficient to provide the premium, provided that the premium may be paid within 31 days after the expiration of the month, during which period of grace the insurance shall remain in full force. If any premium be not paid, either in cash or by deduction as herein provided, when due or within the days of grace, this insurance shall immediately terminate, but may be reinstated within six months upon compliance with the terms and conditions specified in the regulations of the bureau. * * * *
>
> "*These terms and conditions are subject in all respect to the provisions of such Act and*

of any amendments thereto and of all regulations thereunder now in force or hereafter adopted.''

On March 9, 1918, the Director promulgated a regulation known as Treasury Decision No. 20, War Risk, defining the term ''total and permanent disability'' in the following language:

''By virtue of the authority conferred in Section 13 of the War Risk Insurance Act the following regulation is issued relative to the definition of the term ''total disability'' and the determination as to when total disability shall be deemed permanent:

''Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability.

'' 'Total Disability' shall be deemed to be 'permanent' whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on the ground that the insured has become totally and permanently disabled, has recovered the ability to continuously follow any substantially gainful occupation, the payment of installments of insurance

shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue." (Tr. p. 271)

Rules and regulations prescribed by a department of the Government pursuant to statutory authority "become a mass of that body of public records of which the Courts take judicial notice."

Caha v. United States, 152 U. S. 211-222, 38 L. ed. 415-419.

Regulations Defining Permanent Total Disability Adopted by the Bureau Were Not in Excess of Authority.

Assignments of Error—Group B.

12. The Court erred in not finding that under the terms of the War Risk Insurance Act and acts supplemental thereto, the determination of the Bureau of War Risk Insurance and the United States Veterans' Bureau, holding plaintiff not permanently and totally disabled, is final, and that such determination was not an abuse of the powers granted to the said Bureaus under said acts.

20. The Court erred in finding that the regulations defining permanent and total disability under the War Risk Insurance Act and acts supplemental thereto, as adopted by the Bureau of War Risk Insurance and the United

States Veterans' Bureau were in excess of authority.

21. The Court erred in finding that the regulations defining permanent and total disability under the War Risk Insurance Act and acts supplemental thereto, as adopted by the Bureau of War Risk Insurance and the Director thereof and the United States Veterans Bureau and the Director thereof, were repugnant to and in contravention of the meaning and intent of said acts. (Tr. pgs. 20, 22)

We have heretofore set forth the provisions of section 13 of the Act of October 6, 1917, (brief, p. 25), conferring upon the Director full power and authority to promulgate rules and regulations to govern the Bureau of War Risk Insurance, and we have further shown the promulgation, on March 9, 1918, of regulation No. 11, known as Treasury Decision No. 20, War Risk, defining total disability.

This regulation has the full force and effect of law unless inconsistent with the provisions of the War Risk Insurance Act.

Congress, by section 400 (40 Stat. 409) provides that the United States "shall grant insurance against the death or total permanent disability" of any person in the active military or naval service of the United States upon application therefor.

What did Congress mean when it used the ex-

pression "total permanent disability" as applied to War Risk Insurance and was the interpretation put upon these words by said Treasury Decision No. 20 inconsistent with the intention of Congress?

The primary rule of statutory construction is to give effect to the intention of the legislature.

> Rodgers v. U. S., 185 U. S. 83-86, 46 L. ed. 816-18.

We are looking at the state of things then (at the time of its passage) existing, and in the light then appearing seek for the purposes and objects of Congress, in using the language it did. And we are to give such construction to that language, if possible, as will carry out the Congressional intentions.

In construing the War Risk Insurance Act we have the right to consider the report of the Committee of the House wherein the legislation originated, as a guide to its true construction.

> McLean v. United States, 226 U. S. 374-379, 57 L. ed. 260-263,

> Northern Pacific Railway Co. v. Washington, 222 U. S. 370-380, 56 L. ed. 236-240.

In a decision of the Supreme Court rendered January 3, 1921, Justice Pitney said:

> "By repeated decisions of this court it has

come to be well established that the debates in Congress expressive of the views and motives of the individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of a "law-making body. Aldridge v. Williams, 3 How. 9, 24; United States v. Union Pacific R. R. Co., 91 U. S. 72-79; United States v. Freight Assosociation, 166 U. S. 290, 318. But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. Binns v. United States, 194 U. S. 486, 495. And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage. Binns v. United States, supra; Penn. R. R. Co. v. International Coal Co., 230 U. S. 184, 198-199; United States v. Coco Cola Co., 241 U. S. 265-281; United States v. St. Paul, M. & M. Ry. Co., 284 U. S. 310, 318. Duplex Printing Company v. Emil J. Deering, etc., 254 U. S. 443, 65 L. ed. 176."

On Aug. 10, 1917, Mr. Alexander, of the Committee on Interstate and Foreign Commerce, introduced in the House of Representatives the original War Risk Insurance Bill, No. 5723. The original bill is to be found in Congressional Record, 65th Congress, Vol. 55, Part VII, pages 6750-6752.

Section 400 provided that "the United States * * * shall grant insurance against death or total disability."

It seems clear that this total disability is the same total disability which Congress had in mind in Article III (Compensation), directly referred to in Article IV, Section 400).

It will be noted that section 302 of Article III, providing for compensation for total disability and partial disability, in the original bill (Cong. Rec. p. 6751) did not contain these words:

> "Provided, however, That for the loss of both feet or both hands or both eyes, or for becoming totally blind or helplessly and permanently bedridden from causes occuring in the line of duty in the service of the United States, the rate of compensation shall be $100 per month; Provided further, That no allowance shall be made for nurse or attendent."

These words constitute statutory total disability, were taken from Pension provisions, and were added to said section 302 as the result of a sharp controversy on the floor of the House during the passage of the bill. (Cong. Rec. 7078-7080).

At the same time the plan of compensation in said original bill, based on a percentage of the soldier's pay, was likewise, after sharp controversy, amended to a flat rate for officers and soldiers alike. (Cong. Rec., 7077-7078.)

Thus, the plan of the original bill was upset on the floor of the House and it apparently escaped attention that under section 302, as amended, a man totally disabled was entitled to but $30.00 per month, while a man statutorily totally disabled was entitled to receive $100.00 per month.

Obviously, the rate of compensation for disability, whether statutory total or total, should be the same and this condition was not fully corrected until the enactment of section 11 of the Amendment of December 24, 1919 (41 Stat. 373), amending section 302 by subparagraph (3) to read as follows:

> "(3) If and while the disability is rated as total and permanent, the rate of compensation shall be $100 per month; Provided, however, That the loss of both feet, or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand, the sight of one eye, or becoming helpless and permanently bedridden, shall be deemed to be total, permanent disability; Provided further, That for double, total, permanent disability the rate of compensation shall be $200 per month.

It will be noted that this amendment provided—

> "(10) That section 302 of the War Risk Insurance Act as amended shall be deemed to be in effect as of April 6, 1917; * * * *

The point we are attempting to make here is that Total Disability is at least such a degree of disability as would be equal to statutory total disability, as above defined.

This original bill was referred to the Committee on Interstate and Foreign Commerce on August 10, 1917. Hearings were commenced on August 11th and on August 30th the Committee reported the bill with various changes (House Report 130, Parts I, II and III, Congressional Record, 65th Congress, Vol. 55 Part VII, pages 6708-6713). Mr. Rayburn, of the Committee, had charge of the bill and submitted the report of the majority. He says (House Report 130, Part I, page 6708):

> "This insurance is to be sold to the soldiers at normal rates of actual cost which he would pay if he were not a soldier. In this way he can not only secure insurance from the Government but can secure it at a proper rate. Existing insurance companies charge prohibitive rates for war risks.
>
> "While they recognize $8 a thousand as a normal rate for a man 21 years old, they add an additional $50 a thousand for a war risk, making the lowest rate for a soldier by private insurance $58 a thousand. In the next place it is term insurance, which ends with the period unless renewed, but may be renewed at the option of the soldier until the end of the war, when it may be converted into some

other form of insurance. This is provided for because the soldier may be considerably older at the end of the war, his health may be impaired, and if so it would be difficult and expensive for him to secure insurance from a private company. We feel that it is right for the Government to make restitution, as far as possible, by giving him the same benefits as to insurance which he would have enjoyed if he had never served his country in the war. An advantage to the soldiers and their families carried by this bill is that the benefits to be paid are not to be paid in a lump sum, to be squandered or lost in unfortunate investment, but will be paid in installments so as to afford the greatest benefits.

"Another valuable feature of the bill is that if during the first 120 days after enlistment the soldier should fail to take insurance, and die, he will be considered as insured and the benefits of such insurance will go to his family.

"Your committee thinks this bill wise and beneficent in all its features, and though a radical departure in some respects, thinks it will prove a great blessing to our soldiers and their families and be very satisfactory to the country.

"The first, second, and third features provide for the maintenance of the families of the soldiers during service and for compensa-

tion in case of death, and it is believed this is effected much more satisfactorily in this bill than in the existing pension system and will not be so expensive in the long run. The elements of certainty and security afford an incentive to the soldier to go forward confident of protection by the Government to themselves and their families and go far to mitigate the anguish of the families themselves during the unhappy separation from the soldiers."

He says further (House Report 130, Part III, page 6709):

"Any young man physically fit to enter the Army can protect himself and his family present or future, by insurance against death or total disability, but if he enters the Army by this very patriotic service he is deprived for all practical purposes of this right, inasmuch as the additional rates ranging from $37.50 to $100 per thousand, that private companies charge, are absolutely prohibitive. Purely as a matter of justice the Government should make this loss good by compensation in kind; that is, by issuing its own insurance. This, however, is but one of many justifications for article 4 of this bill.

"Article 3 and 4 are to be dealt with together. While the Government can fairly give only a minimum of compensation based upon general conditions throughout the land, it must recognize that men ought not to be content

with this minimum; that they ought, with true American foresight and self-reliance, to procure additional protection for themselves and their families in case they become disabled or die through injuries received in the service.

* * * * * * * * * * *

"We shall preserve American ideals and sustain the self-respect of our fighting youth if we offer them in place of either present or future gratuities a real opportunity to purchase for themselves the protection that they may deem essential for their families. But this protection must be real; it must cover death or disability at any time, not merely within five years after the war. The insurance must mature, if the insured so desires, when he reaches a certain age, as well as by death or total disability. Speculation in the insurance must not be permitted; it must be unassignable and free from the claims of creditors, both of the issured and of the beneficiary. It must not be payable to any and every one, but only to a limited class of relatives. The bill contains all of these provisions.

"Clearly the Government should bear the cust due to the increased mortality that the war will produce. Furthermore, the Government should administer this isurance for its soldiers and sailors as a governmental function, without charge to the insured for the mere administration. The Government will

have no expenses for commissions, medical examinations, taxation, advertising, and investment. The premium rates, therefore, to be charged for the insurance should be the net rates without any addition or loading such as is made by private insurance companies to cover expenses. They should be based upon the ordinary mortality experience in peace times. These are the provisions of the bill."

Mr. Rayburn, in explaining the bill (Cong. Rec. p. 6760) made use of the following language:

"It was my hope that we should close up this bureau when the war was over, but it is absolutely impossible, as I find after an investigation of the question, because we will have men killed; their monthly installments will go along. And we will have some partially disabled, and not enough, though, to collect their insurance then—not amounting to total disability—and we would not feel like closing up the bureau and turning these men out where they can not get insurance in the future."

Mr. Rayburn further said, in explaining the bill (Cong. Rec. p. 6759)—

"Mr. Key of Ohio. Under the provisions of your bill I notice that where a soldier receives total disability, say the loss of both eyes or both arms or both legs, that you give him $40 a month and $20 nurse hire. Then, for partial disabilities, the loss of one arm, one

leg, one eye, the adjudication of that is to be left to the discretion of the Treasury Department. Is that right?

"Mr. Rayburn. Where is it left now? In your law you provide that it shall be left to the Commissioner of Pensions.

"Mr. Key of Ohio. You provide a special rate for total disability, but not for a partial disability.

"Mr. Rayburn. No.

"Mr. Key of Ohio. You cut down the rate from the existing law for disability from $100 to $40, and if there is a disposition to cut down the total disability to $40 from the law, as the Bureau of Pensions has it, what will it do with the partial disabilities—give them a mere pittance?

"Mr. Rayburn. No; we have provided that it shall be settled on a percentage, and let me say that the $40 applies only to the single man.

"Mr. Key of Ohio. The total disability is cut down two-thirds, and if you cut the special rate for total disability down two-thirds, what are you going to do with the other?

"Mr. Rayburn. If his injury is slight, it ought to be cut down.

"Mr. Key of Ohio. For the loss of one arm

or one leg or one eye, what would you call that? Fifty per cent?

"Mr. Rayburn. Perhaps 50 per cent; but that is a matter of administration."

The original bill, the bill as amended and as passed by the House, did not contain either in Article III or IV the expression—total permanent disability.

On September 15, 1917, the bill reached the Senate and was referred to the Committee on Finance.

In a general outline or explanation of the bill by Senator Williams, who had charge of the bill on the floor of the Senate, the following language was used (Cong. Rec. Vol. 55, Part VIII, Oct. 3, 1917, p. 7690):

"The reason that guided us was this: The man is summoned to the colors by his country. The drafted man goes because he must go. The Government creates the war, not the soldier. The war hazard, therefore, is the creation of the Government. Of course, the volunteer ought not to be put upon any lower ground than the drafted man. Now, we thought the Government ought to bear that part of the insurance risk which the Government created, and we thought we ought to make the soldier bear that part which in ordinary peace times he would have had to bear if he had taken out insurance. We therefore charge him just that net premium, which is

$8 in the case I have mentioned. Then the Government bears the war risk and it also bears the overhead charge. It is fair that the Government having deprived a man of his insurability, should put him at least in statu quo ante bellum with regard to insurability, and that is what this bill does.

"When all these people, summoned here to be consulted and to advise in the drafting of this bill, gathered around they expressed themselves as highly delighted with the bill, except that the insurance men kicked about the insurance part of it. They did not want the Government to 'go into the insurance business' as they expressed it. But the Government is not going into the insurance business in that or any general sense. It is not going into the general insurance business at all. In the first place, it is confining its activities simply to the soldiers and the sailors in the service. In the second place, it confines the beneficiaries to the soldiers' and sailors' dependent families.

* * * * * * * * *

"Everything that has been urged against this bill in a demagogic way falls to the ground. There is no just criticism of it from that standpoint. We have done equal and exact justice as well as we know how. We have made these policies non-assignable with the purpose and with the undoubted result of pre-

venting speculation on the part of people who might want to take out policies on lives of soldiers or sailors for speculative purposes. We have made them exempt from the claims of the creditors either of the insured or of the beneficiary, somewhat like a widow's and orphan's policy in the New York Life Insurance Co. under the laws of New York.

"First, then, we have limited the beneficiaries; second, we have limited the amount; third, we have limited the insured to the service; fourth, we have made the policy nonassignable; and fifth, we have exempted it from debts and execution. To these limited extents we have gone into the insurance business, but no farther; and, as far as we have gone, we have simply done that which every government from the beginning of the earth ought to have been doing."

Senator Williams again said (Cong. Rec. Vol 55, Part VIII, p. 7692):

"Here is a man who has taken out a policy. The man is partially disabled; he comes back and his insurability has been totally lost because of the injury received in the war, and he can not get any insurance from private companies. * * * *Of course, this form of policy in this bill never matures unless the man dies or is totally disabled.*"

Section 302 (1), Article III, as the bill passed the House, reads as follows:

> "If and while the disability is total *so as to make it impracticable for the insured person to pursue any gainful occupation,* the monthly compensation shall be in the following amounts * * *."

But these words underlined were stricken out in the Senate. (Cong. Rec. Part. VIII, p. 7697). Immediately thereafter (pages 7698) the Insurance article was amended by the Senate wherever necessary by inserting the word "permanent," in connection with total disability and these amendments were agreed to in conference by the House.

It is evident that Congress intended War Risk Insurance should mature only upon death or actual total disability and then only in the event that said total disability was permanent.

Therefore, it would seem that petitioner can not successfully contend that said Treasury Decision No. 20 requires more than the act itself requires, that he must in fact be actually totally disabled—that it is impossible for him to follow continuously any substantially gainful occupation—and that his actual total disability is founded upon conditions (facts) which render it reasonably certain that such actual total disability will continue throughout his life.

There is nowhere in the original bill, in any amendment thereto or in the explanation of the bill by the respective chairmen of House or Senate

Committees having the bill in charge during its passage, any suggestion that War Risk Insurance could become payable on anything less than actual total permanent disability or death.

In determining the meaning of the phrase "permanent total disability," as used in the War Risk Insurance Act, attention is respectfully invited to the following sections of the War Risk Insurance Act:

> "Sec. 302 (3) * * * Provided, however, That the loss of both feet, or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden, shall be deemed to be total, permanent disability."
>
> "Sec. 302 (4) If and while the disability is rated as partial and permanent, the monthly compensation shall be a percentage of the compensation that would be payable for his total and permanent disability equal to the degree of the reduction in earning capacity resulting from the disability, but no compensation shall be payable for a reduction in earning capacity rated at less than 10 per centum. A schedule of ratings of reductions in earning capacity from specific injuries or combinations of injuries of a permanent nature shall be adopted and applied by the bureau. Ratings may be as high as 100 per centum. The ratings shall be

based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations and not upon the impairment in earning capacity in each individual case, so that there shall be no reduction in the rate of compensation for individual success in overcoming the handicap of a permanent injury. The bureau in adopting the schedule of ratings of reduction in earning capacity shall consider the impairment in ability to secure employment which results from such injuries. The bureau shall from time to time readjust this schedule of ratings in accordance with actual experience."

Under the authority conferred by the Act, the Director has promulgated Regulation No. 11 known as Treasury Decision No. 20, War Risk, supra, defining permanent and total disability. This regulation has the force of law.

U. S. v. Birdsall, 233 U. S. 231, 34 Sup. Ct. 512, 85 L. ed. 930.

U. S. v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. ed. 563.

The Court has judicial knowledge of such regulations.

Caha v. U. S., 152 U. S. 211, 14 Sup. Ct. 513, 38 L. ed. 415.

It will be noted that, except as provided in Sec. 302 (3), Congress has not defined what conditions shall constitute permanent and total disability, but has left the determination of that question for the Director, and has conferred express authority upon the Director to prepare and apply ratings of permanent disability which may be as high as 100 percent.

The practical construction given to a doubtful statute by the department or officers whose duty is to carry it into execution is entitled to great weight and will not be disregarded or overturned except for cogent reasons, and unless it is clear that such construction is erroneous.

Pennoyer v. McConnaughy, 140 U. S. 1-25, 35 L. ed. 363-370.

United States v. Ala. Great Southern R. R. Co., 142 U. S. 615-621, 35 L. ed. 1134-6.

United States v. Union Pac. Ry. Co., 148 U. S. 562, 37 L. ed. 560-572.

United States v. Sweet, 189 U. S. 471-474, 47 L. ed. 907, 908.

The construction given to the act of October 6, 1917, by the Bureau of War Risk Insurance and the officers of the Bureau charged with the duty of administering the act, continued as it has been practically from the date of enactment, should

have impressive force, but when that construction is concurred in by a second department of the Government that force becomes compelling, and a construction so firmly established ought not to be reversed except for the most imperative of reasons, which certainly do not here exist.

United States v. Finnell, 185 U. S. 236-244, 46 L. ed. 890-893, is in point. The court in that case stated:

> "It thus appears that the Government has for many years construed the statute of 1867 as meaning what we have said it may fairly be interpreted to mean, and has settled and closed the account of clerks upon the basis of such construction. If the construction thus acted upon by accounting officers for so many years should be overthrown, we apprehend that much confusion might arise. Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge: United States v. Graham, 110 U. S. 219; Wisconsin C. R.'d Co. v. United States, 164 U. S. 190. But if there simply be doubt as to the soundness of that construction—and that is the utmost that can be asserted by the Government—the action during many years of the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons. Edward v. Darby, 12 Wheat, 208, 210; United States v. Philbrick,

> 120 U. S. 52, 59; United States v. Johnson, 124 U. S. 236, 253; United States v. Alabama G. C. R'd Co., 142 U. S. 615, 621. Congress can enact such legislation as may be necessary to change the existing practice, if it deems that course conducive to the public interests."

The Comptroller General of the United States in his decision of July 25, 1921, and again in his decision of August 9, 1922, held that War Risk Insurance may not be paid for any disabled condition which is not in fact permanently total according to the medical opinion and award of the Bureau.

In his decision of July 25, 1921 (Comp. Gen. Vol. 1, p. 31), he says:

> "The insurance provided for by section 400 of the act of October 6, 1917 (40 Stat. 409), is payable only in case of death or 'total permanent disability,' and may not lawfully be paid for any disabled condition which is not in fact permanently total according to the medical opinion and award of the bureau. As in the case of compensation the director is authorized and empowered by law to decide when a condition of permanent total disability exists. The same legal restriction upon his power to make general regulation which applies to compensation applies with equal force to insurance and I can not approve a regulation which undertakes to establish conclusively by lapse of time a condition of perma-

nent disability which can be determined to exist only by competent medical opinion based upon the facts of any given case. * * *

"But the existence of a condition of total disability of any applicant for compensation or insurance and the temporary or permanent character of the disability is a matter which I think can not properly and lawfully be determined by general regulation. However, as hereinbefore stated, the duty and responsibility of determining these conditions rests upon the director."

Again, in his decision of August 9, 1922 (Comp. Gen. Vol. II, p. 99), he says:

"It is the duty of the director to determine whether or not this man did in fact become permanently totally disabled at any time prior to March, 1920. If he did so become disabled there was no lapse of insurance for failure to pay premiums falling due after that time, and insurance payments and refunds should be adjusted accordingly. If he did not in fact so become disabled the facts stated would indicate that the insurance lapsed in March, 1920, for failure to pay premiums when due and was not thereafter in force, unless the action of the director in collecting premiums from September, 1921, may be taken as equivalent to reinstatement of the unpaid remainder of the insurance. Whether that action may be so taken is not a question of which decision

has been specifically requested, and may depend upon matters of fact not disclosed by the submission. Responsibility for the determination in this case of the condition of permanent total disability and the date of its commencement is upon the Director of the Veterans' Bureau, not upon the Comptroller General.

"In the second case as in the first it is for the director to determine whether the insured did in fact become permanently totally disabled and if so on what date the permanent total disability commenced. * * *"

"I may repeat here that it is the duty of the Director of the Veterans' Bureau to determine as a matter of fact whether this insured had become permanently and totally disabled prior to his death, and if so at what time that condition commenced. If the director finds that the condition in fact existed and that it commenced on a date prior to the time for which the last premium was paid, there was no lapse of the insurance and no erroneous payment, and further payments should be made accordingly."

On the character of the insurance granted by the United States the Comptroller of the Treasury, now succeeded by said Comptroller General, in his opinion of July 5, 1919, said:

"It has been suggested that in granting the insurance and collecting the premiums therefor the United States assumed a contractual

obligation to pay in any event and in all cases the full amount, 240 installments, of the insurance, but I can not accept this view of the matter. That the premiums charged were inadequate to cover the risks assumed by the United States is clearly shown by the provisions of section 403 (40 Stat. 410) of the Act. And the purpose of the Government in assuming the risks at inadequate premium rates was to furnish a measure of protection and support to dependent relatives of persons in the military and naval service. This insurance feature of the law is not an out-and-out contract of insurance on an ordinary business basis, neither is it a pension, but it partakes of the nature of both.

"In granting this insurance it was clearly within the power of the United States to say to what persons and under what circumstances the insurance would be paid. The statute designates persons to whom and the conditions under which payments are to be made, and in view of the nature of the risks assumed, and the inadequacy of the premiums charged; in other words, considering the pension as well as the insurance feature, it is but reasonable to assume that payments were not intended to be made except to the persons and under the conditions mentioned in the act. It must be held, therefore, that the obligation of the United States is only such as it assumed under the express provisions of the statute."

In this last decision, said Comptroller held that even accrued installments of insurance unpaid at the death of a beneficiary did not pass to said beneficiary's estate, and thus made legislation necessary by Congress to "change existing practice," to make insurance payable which was not theretofore payable. (See Sec. 19, 41 Stat. 376-377).

Now what is the situation regarding Regulation No. 11 (Treasury Decision No. 20, brief p. 27) defining permanent and total disability?

This regulation was promulgated March 9, 1918, and has controlled the adjudication of every case passed upon by the Bureau from that date to this.

Meanwhile, *"The War Risk Insurance Act"* has been many times amended by Congress, notably the amendment of June 25, 1918 (40 Stat. 609-616), the amendment of December 24, 1919 (41 Stat. 371-376), the amendment of August 9, 1921 (42 Stat. 147-157), and the amendment of March 4, 1923 (42 Stat. 1521-1527).

In none of the amendments has Congress seen fit to "change existing practice" on the question now under consideration, but in several of these amendments has amended Article IV.

It is insisted that General Order No. 20 either as an express term of the petitioner's contract of insurance or is a regulation lawfully issued by the Director of this Bureau is not contrary to the intent and meaning of the War Risk Insurance Act

and is not in excess of the authority conferred upon the Director by the provisions of said Act.

The Court Erred in Finding That the Petitioner Was Totally and Permanently Disabled Within the Meaning of the War Risk Insurance Act by Failing to Find That Petitioner's Insurance Lapsed August 31, 1919.

Assignments of Error—Group C.

(Tr. pgs. 18, 19, 21)

1. The Court erred in finding that plaintiff was permanently and totally disabled within the meaning of the War Risk Insurance Act and acts supplemental thereto.

2. The Court erred in finding that plaintiff was permanently and totally disabled within the meaning and intent of the War Risk Insurance Act and acts supplemental thereto before August 31, 1919.

3. The Court erred in finding that the plaintiff's contract of insurance, under the War Risk Insurance Act and acts supplemental thereto, did not lapse on August 31, 1919.

4. The Court erred in failing to find that the plaintiff's contract of insurance under the War Risk Insurance Act and acts supplemental thereto, lapsed on August 31, 1919.

5. The Court erred in finding that plain-

tiff's contract of insurance, under the War Risk Insurance Act and acts supplemental thereto, matured on August 31, 1919.

14. The Court erred in finding that there is no reasonable probability that the plaintiff will recover from any disability or ailment he may be suffering from.

15. The Court erred in finding that an ailment or disease, even though curable, constitutes permanent and total disability of the one afflicted therewith within the meaning and intent of the War Risk Insurance Acts and acts supplemental thereto, when the one so afflicted has been dispossessed thereby of any substantial earning power, and there is reasonable probability that such disability will continue for an indefinite time.

16. The Court erred in failing to find that plaintiff, if afflicted at all, was afflicted with an ailment or disease that is curable.

On March 15, 1918, the petitioner made application for and was granted $10,000 insurance by the application set forth. It is insisted that the provisions of the War Risk Insurance Act, Bulletin No. 1, and Treasury Decision No. 20, together with the Application for Insurance above mentioned constituted his contract of insurance with the Bureau.

See Helmholz v. Horst, et al, 294 Fed. 417.

Gilman v. U. S., 294 Fed. 422.

By the express terms of the contract of insurance as contained in Treasury Decision No. 20 above set forth (Tr. p. 271), the petitioner was to be deemed permanently and totally disabled only upon a showing that he suffered an impairment of mind or body which rendered it impossible for him to continuously follow any substantially gainful occupation, and that such impairment of mind or body was founded upon conditions which rendered it *reasonably certain that it would so continue throughout the life of the petitioner.*

The petitioner has not sought any modification of his contract in equity but has brought suit at law upon the terms of his contract. He must recover, therefore, if he recovers at all, upon the terms of the contract in the manner and form which such contract exists.

In his finding of fact under date of December 1, 1923, the court found that "the disabilities resulting from said disease and said injury are of such a nature that they are reasonably likely to continue for a *long, incomputable, indefinite time.* (Tr. p. 296).

In his opinion dated November 26, 1923, the Court stated:

> "From this it appears in the main and with little dissent that subsequent to the discharge

> plaintiff has given little evidence of tuberculosis, but has been and is subject to chronic bronchitis, fainting spells, extreme nervousness, hysteria, psychosis maniac depressive, is of constitutional psycopathic inferiority superimposed emotional irritability and paranoid trend, is unable to make social adjustment, is disabled to care for self, to follow his vocation of mining engineer or any other vocational training, *and reasonably likely to be for an indefinite period.*" (Tr. p. 291).

The Government respectfully insists that the finding that the petitioner was suffering with "disabilities reasonably likely to continue for an indefinite period" or disabilities which are "reasonably likely to continue for a long, incomputable, indefinite time" is not equivalent to a total disability which is founded upon conditions which render it *reasonably certain that it will so continue throughout the lifetime of the person suffering from it,* and that under the specific findings made by the court, the petitioner cannot be deemed to be permanently and totally disabled within the meaning and intent of Treasury Decision No. 20, which is an express term of his contract of insurance.

As the court found facts which did not warrant a finding that the petitioner became permanently and totally disabled and within the meaning of the War Risk Insurance Act, it is obvious that his insurance did not mature by reason of such disabil-

ity or disabilities, and that his insurance lapsed on August 31, 1919, for non-payment of premiums and was not in force and effect after that date.

While the court purports to find that petitioner became permanently and totally disabled from the date of discharge as a matter of fact, such finding is not really a finding of fact, but is a conclusion of law. The point we are trying to make is this—the nature and extent of the disabilities by reason of which petitioner was suffering at time of discharge, are questions of fact. *Whether or not such disabilities separately or taken together permanently and totally disabled the petitioner within the meaning of the War Risk Insurance Act, is a question of law.* It will be noted that the court has not expressly found the dates between which the petitioner was suffering with the injuries or diseases found by the court, or the dates between which petitioner was totally disabled by reason of such injuries or disabilities. It was not denied that the Government had rated petitioner totally disabled from date of discharge by reason of tuberculosis, but it was vigorously asserted by the Government that the petitioner gave no evidence of any mental or nervous trouble until long after August 31, 1919, and that certainly he was not totally disabled by reason of mental or nervous injury or disease on or before August 31, 1919, and not permanently and totally disabled by reason of tuber-

culosis or any other injury or disease at that time.

Concerning the petitioner's tubercular condition the Court in its opinion of November 26, 1923, states that "subsequent to discharge plaintiff has given little evidence of tuberculosis." (Tr. p. 291).

It is insisted that disabilities resulting from injuries or diseases which arise at different times and endure for different periods of time cannot be tacked together to make a permanent total disability from the date which the first of such disabilities arose. Permanent disability excludes that which is merely temporary, and the word "permanent" in connection with the word "disability" will be held to exclude the consideration of a disability which is merely temporary.

> Joyce on Insurance, 2nd Ed. Vol. V, Sec. 3035, Hollobough v. Peoples Insurance Co., 138 Pa., 595, 22 Atl. 29.

Permanent total disability can only be found when the disabled person is totally disabled by reason of some injury or disease which is of such a nature and extent as will make it reasonably certain that a total disability from such injury or disease will continue throughout the remainder of the disabled person's lifetime. In other words, admitting that the petitioner was totally disabled from the date of discharge until July 1, 1920, by reason of tuberculosis or chronic bronchitis, and

that he was totally and permanently disabled from January 1, 1920, by reason of some mental or nervous disease which had not totally disabled him prior thereto, it is insisted that a permanent and total disability could not be found from the date of discharge but could only be found to have existed from May 1, 1920. When it is remembered that a permanent and total disability matures War Risk Insurance whereas a total temporary disability does not, and will not prevent lapse of same, the importance of this question is at once apparent.

In the present case the court has contented itself with finding a total disability from the date of discharge by reason of several diseases or injuries and a finding that one or more of the disabilities resulting from said disease or said injury are of such a nature that petitioner is likely to be totally disabled for a long, incomputable, indefinite time. Upon such findings the court has concluded that petitioner has a permanent total disability from the date upon which such combination of injuries and diseases has totally disabled the petitioner. This is a conclusion of law and is contrary to the express terms of petitioner's contract of insurance and the lawful rules and regulations of the United States Veterans' Bureau.

Again it is believed that judicial notice will be taken of the fact that chronic bronchitis, fainting spells, extreme nervousness, and hysteria are, in

common knowledge, temporary rather than permanent diseases, and that while any or all of such diseases may produce a total disability, such total disability will in all probability be cured or at least diminished in the course of time. Concerning the finding that petitioner is subject to "psychosis maniac, depressive, is of constitutional psycopathic inferiority with superimposed emotional irritability and paranoid trend," attention is called to the fact that the petitioner's constitutional psychopathic inferiority did not prevent him from becoming a mining engineer, and that despite the finding of "superimposed mental irritability and paranoid trend," he was able to testify in his own behalf by deposition and the court itself found that such testimony indicates "average intelligence, at least." (Tr. p. 292).

Thus it appears that the court has found that petitioner was suffering only with diseases which as a matter of common knowledge are essentially temporary in nature except psychosis, maniac, and constitutional psycopathic inferiority. The court, however, found that petitioner's constitutional condition permitted completion of engineering course and did not affect his testimony.

It is submitted that upon the facts related by the court the petitioner cannot as a matter of ordinary human knowledge be deemed to be permanently and totally disabled either within the mean-

ing and intent of permanent and total disability as specified by the War Risk Insurance Act, or within the meaning of that term in its ordinary acceptation.

While the Government insists that the petitioner cannot be deemed to have been or to be permanently and totally disabled at any time from the diseases or injuries found by the court, attention is respectfully invited to the fact that unless petitioner in fact becomes permanently and totally disabled on or before August 31, 1919, his insurance lapsed on that date and was not thereafter in force and effect. Hence, petitioner's physical or mental condition after August 31, 1919, is immaterial and irrelevant unless and until he is first shown to have been permanently and totally disabled on or before August 31, 1919.

Admission of Testimony Concerning Matters Arising After August 31, 1919, *Was Error*
Assignments of Error—Group D.

(Tr. pgs. 19, 20).

6. The Court erred in admitting in evidence, over objection of defendant, all exhibits of plaintiff concerning matters arising after August 31, 1919.

7. The Court erred in admitting testimony on behalf of the plaintiff, and over the objection of the defendant, concerning matters arising after August 31, 1919.

8. The Court erred in not restricting testimony on behalf of plaintiff to matters and events on and before August 31, 1919, and such that had been submitted by or on behalf of the plaintiff to the Bureau of War Risk Insurance or to the United States Veteran's Bureau.

11. The Court erred in admitting the testimony of F. L. Carey, William P. Callahan, Loy J. Molumby, Dola Beller, Dr. Dora Walker, Dr. J. C. Michael, Dr. Thomas F. Walker, Dr. C. E. K. Vidal, Herbert H. McGovern, Sr., W. S. Bentley and Herbert H. McGovern, Jr., on behalf of plaintiff and over the objection of defendant.

Over the objection of the Government petitioner was allowed to introduce the testimony of F. L. Carey, William P. Callahan, Loy J. Molumby, Lola Beller, Dr. Dora Walker, Dr. J. C. Michael, Dr. Thomas F. Walker, Dr. C. E. K. Vidal, and Dr. W. S. Bentley. The Government objected to the admission of this evidence for the reasons that none (see record) of these witnesses were acquainted with petitioner until long after August 31, 1919, and that as it had not been admitted or shown that his insurance was in force at any time after that date, his physical or mental condition thereafter was immaterial and irrelevant. Presumably, the testimony of these witnesses was admitted "de bene," in expectation that petitioner would later

introduce evidence showing a permanent total disability existing on or before August 31, 1919. (Tr. pgs. 32, 37, 39, 48, 49, 56, 59, 63, 74, 184, 190, 231).

The petitioner, however, introduced no further evidence except the testimony of himself, his father, Herbert H. McGovern, Sr., and extracts from the records of the U. S. Veterans' Bureau. The admission of the testimony of the petitioner's father, Herbert H. McGovern, Sr., was objected to by the Government for the reason that such testimony was indefinite, uncertain, and did not specify the dates upon which the witness noted the petitioner to be in the condition stated, but merely testified that he was suffering with certain disabilities without specifying whether such disabilities existed before or after August 31, 1919. (Tr. p. 49). Clearly, such testimony was insufficient to warrant a finding that the petitioner became permanently and totally disabled on or before August 31, 1919.

The records of the Government so introduced concerned the petitioner's physical and mental condition both before and after August 31, 1919. None of these reports indicated that the petitioner was suffering with any nervous or mental trouble or psychoneurosis until long after August 31, 1919, but showed that he was suffering from tuberculosis only at all times prior to that date.

The records of the Government so introduced

were not proof of the fact as to what petitioner's physical condition was, but merely proof of what the records of this Bureau showed his condition to be.

Evanston v. Gunn, 99 U. S. 66, and McInerney v. U. S., 143 Fed. 144, are cited as authority for the proposition that such records were admissible in evidence in proof of the facts stated therein. It is submitted, however, that the records in these cases concerned matters of fact within the knowledge of the persons making such records, and were also matters of common knowledge. There could be but little or no doubt as to the truth of the facts stated therein. In the present case, the records involved statements based upon the uncertainties of medical opinions and diagnoses concerning which there were, of necessity, much conjecture and differences of opinion.

Apart from the records of this Bureau the petitioner has utterly failed to submit any evidence as to his disability, if any, on or before August 31, 1919, and by reason of such failure has not rendered any of the other testimony introduced in his case material or relevant thereto. Hence, there was no evidence before the court upon which a finding could be made that petitioner was permanently and totally disabled on or before August 31, 1919.

While the testimony of the witnesses in this case was alleged to be admitted "de bene" and under

the promises that the same would receive no consideration unless found competent, (i. e. permanent and total disability on or before August 31, 1919) it is submitted that the court has, of necessity, used this testimony in reaching its decision in this case, and that apart from such evidence, there was nothing upon which the court might pass.

Assuming, however, that the records of this Bureau were properly admitted in evidence and were proof of the facts therein recited, such evidence shows that the petitioner was suffering only with a tubercular or respiratory disability until long after August 31, 1919, and that the petitioner never claimed or asserted that he was suffering with any other injury or disease until long after that date. Under such aspect of the case the petitioner could only be found to be suffering with tuberculosis, and the court specifically found that "subsequent to discharge plaintiff has given little evidence of tuberculosis." (Tr. p. 291).

Hence, whether the records of this Bureau were admissible or inadmissible, the court could only properly have found upon all the evidence presented in the case that the petitioner was not suffering with any injury or disease which permanently and totally disabled him on or before August 31, 1919, and that his insurance lapsed and became null and void on that date.

The Court Erred in Failing to Adopt the Findings of Fact Submitted by the Government and by Approving and Adopting the Findings of Fact in Accordance With Such Submission by the Petitioner.

Assignments of Error—Group E

(Tr. pgs. 22, 23).

23. The Court erred in failing to find and adopt the findings of fact submitted by the defendant.

24. The Court erred in approving and adopting and making findings of fact and conclusions of law, in accordance with such submitted by plaintiff, even with the modifications made by the Court to paragraph 4 thereof.

25. The Court erred in not rendering judgment herein in favor of defendant and against plaintiff, for the reason that the plaintiff's contract of insurance had lapsed for non-payment of premiums and had terminated before commencement of suit, and for the further reason that plaintiff was never permanently and totally disabled while his contract of insurance was in full force and effect.

26. The Court erred in rendering judgment herein in favor of plaintiff and against defendant.

27. The Court erred in entering herein a

judgment in favor of the plaintiff and against the defendant.

Section 7 of the Tucker Act (24 Stat. 506, U. S. Comp. St. 1901, p. 755) provides:

> "That it shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein, and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon."

In its request for findings of fact, the Government asked that the court find that Bulletin No. 1, issued October 15, 1917, Treasury Decision No. 20, issued March 8, 1918, and all other rules and regulations promulgated pursuant to authority conferred upon the Director of the Bureau of War Risk Insurance, constituted the terms of the petitioner's contract of insurance with the United States of America. (Tr. pgs. 272, 273). The court failed to so find, and in lieu of the requirements of permanent total disability as defined by Treasury Decision No. 20, found that a disability existing for a long, incomputable, indefinite time constituted permanent and total disability. (Tr. p. 293).

The Government further requested the court to find that petitioner had not shown any evidence of hysteria or other nervous or mental disease which totally disabled him until long after August

31, 1919. (Tr. p. 279). The court ignored this request and found the existence of several disabilities subsequent to discharge without specifying the dates between which such disabilities existed.

The findings requested would have clearly shown whether the court considered Treasury Decision No. 20 as an express term of the petitioner's contract of insurance or a valid regulation of the U. S. Veterans' Bureau, and whether or not the court purported to find a permanent and total disability from the date of discharge resulting from mental or nervous diseases solely, or upon a continuation of total disability caused by the successive diseases which petitioner suffered since discharge. As the court failed to make these specific findings requested by the Government, the facts and reasons upon which the court found judgment against the United States cannot be determined.

The case of Hymans v. U. S., 139 Fed. 997, contains the following excerpt:

> "In U. S. v. Swift the United States Circuit Court of Appeals in this circuit have lately sent down an opinion (139 Fed. 225), Judge Putnam speaking for the court, in which that court comments upon the Tucker act and the proceedings in causes under that act. In discussing the opinion which the court

must file under that act, Judge Putnam says: 'Under the statute that opinion is not to be regarded as the usual opinion of the trial judge, but must be accepted as a part of the record.' It seems clear that the purpose of the opinion is to enable the public and the appellate court to find upon the record a formal statement of the findings of the circuit court, both upon questions of law and fact and the reasons for such findings."

Admission of Evidence Never Submitted to the Bureau Was Error.

Assignments of Error—Group F.

(Tr. pgs. 19, 20).

9. The Court erred in admitting in evidence the exhibits of plaintiff for a purpose other than to show a basis of disagreement between plaintiff and defendant.

10. The Court erred in admitting, on behalf of plaintiff and over the objection of defendant, testimony on matters never submitted to the War Risk Insurance Bureau or the United States Veterans' Bureau, and which were not and could not be the basis of disagreement.

11. The Court erred in admitting the testimony of F. L. Carey, William P. Callahan, Loy J. Molumby, Lola Beller, Dr. Dora Walker, Dr. J. C. Michael, Dr. Thomas F.

Walker, Dr. C. E. K. Vidal, Herbert H. McGovern, Sr., W. S. Bentley and Herbert H. McGovern, Jr., on behalf of plaintiff and over the objection of defendant.

It is elementary that the Government cannot be sued without its consent. Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination and courts may not go beyond the letter of such consent.

Schillinger v. U. S., 155 U. S. 163, 15 Sup. Ct. 85, L. ed. 108.

Cassarello v. U. S., 265 Fed. 326.

Section 13 of the War Risk Insurance Act (40 Stat. 555) in part provides:

"That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in section five. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context

otherwise requires, shall or may be made by the director, subject to general direction of the Secretary of the Treasury. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment, compensation, or insurance provided for in this Act, the forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards; Provided, however, That payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers shall not exceed $3 in any one case: And provided further, That no claim agent or attorney shall be recognized in the presentation or adjudication of claims under articles two, three, and four, except that in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides."

It is clear that the Director of the Bureau of War Risk Insurance, now the United States Vet-

erans' Bureau, is charged with the duty of determining by questions involved in administering the provisions of the War Risk Insurance Act. Congress has not consented to be sued on claims arising under the War Risk Insurance Act in every event, but only in the event of a disagreement between the Bureau and a beneficiary. It is submitted that there can be no disagreement between the Bureau and the plaintiff as to evidence never submitted to the Bureau and that such evidence cannot constitute the basis of a suit of an action under the authorization contained in Section 13 above quoted. This may be demonstrated by the following example.

Suppose a person claims to be permanently and totally disabled from tuberculosis, and after such claim has been denied by this Bureau, brings an action under Section 13 of the War Risk Insurance Act, and attempts to prove permanent and total disability by reason of loss of both legs. To hold that proof of loss of both legs is admissible in evidence would, in fact, deprive the Director of his duty of deciding all questions arising under the Act and authority expressly conferred upon him by Sections 2 and 13, supra, of the said War Risk Insurance Act. In the present case none of the evidence as to the nature and extent of the petitioner's disability was shown to have been submitted to the Bureau prior to the trial of this ac-

tion and the Government objected to the admission of all such evidence on the specific ground that such evidence not having been previously submitted to the Bureau could not constitute the basis of a disagreement which would authorize the commencement of an action against the Government under the provisions of Section 13. (Tr. pgs. 32, 37, 39, 48, 49, 56, 59, 63, 64, 74, 184, 190, 231.)

The court below on November 26, 1923, in the case of Mitchell v. United States, also a case involving War Risk Insurance, recognizes this jurisdictional question in the following language:

> "Presentation of claim and disagreement is a prerequisite to maintenance of this suit.
>
> "This condition was not met, this suit can not be maintained, and it is dismissed.
>
> "A claim for compensation and disagreement thereon, is not the like in respect to insurance, the first will not serve for the last nor as a justification of suit.
>
> " 'Men must turn square corners when they deal with the Government' and assume to hale it into court. Bourquin."
>
> See also Covey v. U. S., 263 Fed. 768-777.

As none of the testimony of any of the petitioner's witnesses was shown to have been previously submitted either in form or substance to the Bu-

reau for consideration, a claim based upon such evidence was never allowed or disallowed by the Director of the U. S. Veterans' Bureau and such evidence could not constitute the basis of a disagreement.

It is urged that under the express terms of the statute, questions involving the War Risk Insurance Act in the first instance, at least, are for the determination of the Director of the U. S. Veterans' Bureau and that the court below ousted the Director of his statutory duty by receiving evidence not previously submitted to the Bureau. The jurisdiction of the court was conditioned upon a disagreement between the petitioner and the Bureau, and a showing of such disagreement was necessary to establish the authority of the court to entertain petitioner's action.

The Court Erred in Reversing the Finding of This Bureau to the Effect That Petitioner Did Not Become Permanently and Totally Disabled on or Before August 31, 1919.

Assignments of Error—Group G

(Tr. pgs. 20, 21)

12. The Court erred in not finding that under the terms of the War Risk Insurance Act and acts supplemental thereto, the determination of the Bureau of War Risk Insurance and the United States Veterans' Bureau,

holding plaintiff not permanently and totally disabled, is final, and that such determination was not an abuse of the powers granted to the said Bureau under said acts.

18. The Court erred in finding that in the event of disagreement under the provisions of the War Risk Insurance Act and acts supplemental thereto, the whole matter of the insured's disability is at large and open to contention, and the Court is not restricted to a review of the Bureau's judgment.

23. The Court erred in failing to find and adopt the findings of fact submitted by the defendant.

Section 1 of the War Risk Insurance Act, as amended August 9, 1921, in part provides:

"The powers and duties pertaining to the office of the Director of the Bureau of War Risk Insurance now in the Treasury Department are hereby transferred to the director, subject to the general direction of the President, and the said office of the Director of the Bureau of War Risk Insurance is hereby abolished."

Sec. 2. The Director, subject to the general direction of the President, shall administer, execute and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations not inconsistent with the provisions

of this Act which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act except as otherwise provided herein."

"Sec. 3. The functions, powers, and duties conferred by existing law upon the Bureau of War Risk Insurance are hereby transferred to and made part of the Veterans' Bureau."

"Sec. 13 provides in part:

"That the Director, subject to the general direction of the Secretary of the Treasury, shall administer, execute and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in Section Five." (Relating to suits in Admiralty under Marine and Seaman's Insurance.'

The sections above quoted clearly show that Congress intended that the Director should determine all questions relative to the administration of the War Risk Insurance Act. Congress did not intend to abrogate the power thus given, in Sections 2 and 13, to the Director, by enacting that part of Sec. 13 which reads:

"that in the event of disagreement as to a

> claim under the contract of insurance between the Bureau and any beneficiary or beneficiaries thereunder an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides."

This provision of Section 13 above quoted, while giving a dissatisfied claimant a right to bring suit for insurance, contemplated that the Director of the Bureau should be charged with the duty of determining all questions involved in administering the provisions of the War Risk Insurance Act. It seems clear that Congress did not intend to clog the United States courts with War Risk Insurance claimants, or that the United States courts should reverse the findings of the Director on a mere difference of opinion, but only in such cases as it could be shown that the action taken by the Director was contrary to the provisions of the Act, or that there was no evidence to warrant his action and that his findings were unreasonable. Hence, it is believed that the finding of the Director should be sustained by the courts, even though there is some evidence which might warrant a different finding, and that the Director's action should not be reversed by the courts unless it is clearly shown that such action was not based on any evidence, and is clearly unreasonable.

The propositions stated above are sustained by the following decisions:

> "Congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted to the courts for judicial determination, and courts may not go beyond the letter of such consent."

Schillinger v. U. S., 155 U. S. 163, 15 Sup. Ct. 85, 39 L. ed. 108.

> "It is plain that Congress intended to confer upon the administrative officer full and exclusive authority to decide all questions arising under the Act (War Risk Insurance Act) in so far as they involved the exercise of executive duties and required the determination of disputed facts, and to the extent indicated, to make such decisions final and not reviewable by the courts."

Silberschein v. U. S., 280 Fed. 917.

(This case is one brought under the War Risk Insurance Act on a claim for compensation, but it is believed that what is stated above is applicable to claims for insurance as well as claims for compensation.)

See also:

U. S. v. Fisher, 223 U. S. 683, 32 Sup. Ct. 356, 56 L. ed. 610.

Degge v. Hitchcock, 229 U. S. 162, 33 Sup. Ct. 639, 57 L. ed. 1135.

U. S. v. Laughlin, 249 U. S. 440, 39 Sup. Ct. 340, 63 L. ed. 696.

U. S. v. Babcock, 250 U. S. 328, 39 Sup. Ct. 464, 63 L. ed. 1011.

"Where particular authority is confided in a public officer, to be exercised in his discretion upon an examination of facts of which he is the appropriate judge, his decision upon these facts in the absence of any controlling provisions is absolutely conclusive."
Allen v. Blunt, Fed. Case No. 216.

It is submitted, therefore, that the finding made by the Director of the United States Veterans' Bureau to the effect that the plaintiff was not permanently and totally disabled at the time his insurance lapsed under the authority conferred upon him by the statute is entitled to great weight and ought not to be reversed unless it is clearly shown that such finding was unreasonable or at least contrary to the weight of the evidence. The court below did not find that the Bureau's decision was unreasonable or against the weight of the evidence, but simply found that the evidence before the court (not the evidence submitted by petitioner to the Bureau) showed petitioner to be permanntly and totally disabled. Such finding is clearly con-

trary to the express intent and meaning of the Statute.

For the reasons stated we earnestly contend that the petitioner did not become permanently and totally disabled within the meaning and intent of the War Risk Insurance Act on or before August 31, 1919; that his insurance lapsed on that date for non-payment of premiums, and was not thereafter in force and effect; and that judgment of the court below was erroneous and should be reversed.

Respectfully submitted,

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Attorneys for the United States of America,

Plaintiff in Error.

No. 4202.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

HERBERT H. McGOVERN, JR.,
Defendant in Error.

Writ of Error to the District Court of the United States for the District of Montana.

BRIEF ON BEHALF OF HERBERT H. McGOVERN, JR.
Defendant in Error

LOY J. MOLUMBY,
CHAS. DAVIDSON,
Attorneys for Herbert H. McGovern, Jr.,
Defendant in Error,
Great Falls, Montana.

Filed....., 1924

.....Clerk

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

HERBERT H. McGOVERN, JR.,
Defendant in Error.

JURISDICTION

The first question to present itself is one of jurisdiction. The action is one at law. The cause was tried to the Court sitting without a jury (Tr. pp. 16, 31). The record fails to disclose that there was any written waiver of a trial by jury. The fact is that there was no written waiver made or filed. Counsel for Plaintiff in Error state that motion for trial without jury was filed and granted (Brief of Plaintiff in Error, p. 2). This statement is not supported by the record but is useful in determining the attitude of Plaintiff in Error as to a trial by jury.

Counsel for Plaintiff in Error assume and allege that the cause was tried by the district court under the provisions of section 24, paragraph 20 of the Judicial

Code (Brief of Plaintiff in Error, pp. 2, 71). If this contention is correct, no jury trial could be had as that section of the Judicial Code provides that all suits brought and tried under its provisions shall be tried by the Court without a jury.

It is the contention of the Defendant in Error that this cause was not tried before the district court under the provisions of section 24, paragraph 20 of the Judicial Code, which confers concurrent jurisdiction upon District Courts with the Court of Claims, but that the cause was tried before the court under its ordinary, usual and general jurisdiction; that since the cause was tried by the court without a jury and there was no written waiver of a jury trial as required by Section 649 Rev. Stat. (13 Stat. at L. 501, 6 Fed. Stat. Anno. (2nd Ed.) 130, Comp. Stat. 1587) there is nothing for this Court to review, as under such circumstances only questions of law arising upon the process, pleadings or judgment, can be here reviewed, and none such arise.

Section 13 of the War Risk Insurance Act (Act of May 20th, 1918, C. 77, Sec. 1, 40 Stat. at L. 555, Comp. Stat. 514 kk, 9 Fed. Stat. Anno. (2nd Ed.) 1305) provides in part as follows:

> "That in the event of disagreement as to a claim under the contract of insurance betweeen the bureau and any beneficiary or beneficiaries thereunder an action on the claim may be brought against the United States in the district court of the United States in and for the District in which such beneficiaries or any one of them resides."

The jurisdiction of the district court to hear and de-

termine this cause is conferred by the above quoted section. The question presented is whether the jurisdiction so conferred is the ordinary, usual and general jurisdiction of the district court, of which a trial by jury is an incident, or the special jurisdiction provided for by section 24, paragraph 20 of the Judicial Code wherein the district court sits as a Court of Claims without a jury.

This question was fully determined by the Supreme Court of the United States in *UNITED STATES v. PFITSCH,* 256 U. S. 547, 65 L. Ed. 1084, 41 Sup. Ct. Rep. 568, and in *UNITED STATES v. NATIONAL CITY BANK OF NEW YORK,* 281 Fed. 754 (C. C. A. 2nd Cir.).

In the PFITSCH case, above, the question was presented to the Supreme Court under section 10 of the Lever Act (August 10th, 1917, Chap. 53, 40 Stat. at L. 276, 279; Comp. Stat. Sec. 3115 1/8 e, 3115 1/8 ii, Fed. Stat. Anno. Supp. 1918, pp. 181, 185). The case was tried before the district court without a jury. The government took the case to the Supreme Court by direct Writ of Error. Mr. Justice Brandeis in delivering the opinion of the Court stated:

> "The preliminary question arises whether this Court has jurisdiction on direct writ of error. The answer to be given to it depends upon the nature of the jurisdiction conferred upon the district court by section 10 of the Lever Act. If the jurisdiction is to be exercised in the manner provided by section 24, paragraph 20, of the Judicial Code, which confers upon the district court jurisdiction concurrent with the court of claims, a direct writ of error lies from

this court. *J. Homer Fritch v. United States,* 248 U. S. 458, 63 L. Ed. 359, 39 Sup. Ct. Rep. 158. If, however, the jurisdiction is the ordinary jurisdiction of the district court, the writ of error should have gone, in the first instance, from the circuit court of appeals, under section 128 of the Judicial Code. The nature of the jurisdiction of the district court is of importance, not only because of the question directly involved, but because the answer given to it will determine incidentally whether plaintiffs who proceed under section 10 are entitled to a trial by jury. For section 24, paragraph 20, of the Judicial Code, declares that 'all suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.' See *United States v. McGrane* ..... C. C. A. ..... 270 Fed. 761; *Filbin Corp. v. United States,* 266 Fed. 911."

The Court then entered upon a discussion of the provisions of the Lever Act. The jurisdictional part of that section provides that if any person is not satisfied with the President's award he should receive 75% of the award and for the balance "shall be entitled to sue the United States * * * and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies." The Court next entered upon a discussion of the other section of the Lever Act which confer jurisdiction in other and different terms. Those sections particularly provide that persons dissatisfied with the President's award should be entitled to sue the United States in the manner provided by section 24, paragraph 20 and section 145 of the Judicial Code.

After a discussion of the legislative history of the Lever Act in which the Court points out that the juris-

dictional provisions of section 10 of that Act were inserted deliberately, the Court stated:

"It is plain, then, that Congress had this question presented to its attention in a most precise form. It had the issue clearly drawn between granting for the adjudication of cases arising under this section concurrent jurisdiction in the court of claims and the district courts, without a trial by jury, or of establishing an exclusive jurisdiction in the district courts, of which the right to a jury trial is an incident. The first alternative was rejected, and the reason given for the rejection in the statement of the House conferees is that the proposed amendment would confer jurisdiction upon the court of claims. It is difficult to conceive of any rational ground for rejecting the clear and explicit amendment made by the Senate except to accord a trial by jury. All difficulties of construction vanish if we are willing to give to the words of section 10, deliberately adopted, their natural meaning.

"Furthermore, it is significant that this is not the only occasion upon which Congress has provided for suits against the United States exclusively in the District Courts. Section 1 of the War Risk Insurance Act of May 20, 1918, Chap. 77, 40 Stat. at L. 555, Comp. Stat. section 514 kk, provides that suits upon insurance policies 'may be brought against the United States in the District Court of the United States in and for the district in which such beneficiaries or any of them reside.' The act of March 4, 1919, chap. 125, section 3, 40 Stat. at L. 1348, Comp. Stat. section 3115 1/8 kk (3), which authorizes the President to requisition storage facilities for wheat, provides, in the words of section 10 of the Lever Act, that 'jurisdiction is hereby conferred on the United States district courts to hear and determine all such controversies.' And Section 2 of the Act of July 11, 1918, chap. 145, 40 Stat. at L. 898, Comp. Stat. 514 e, Fed. Stat. Anno. Supp. 1918, p.

907, permits suits against the United States on Marine insurance 'in the district courts of the United States sitting in admiralty.'

"A survey of the war legislation permitting the seizure of property discloses that Congress has established three distinct jurisdictions for the purpose of suit against the United States for compensation. In seventeen instances it definitely provided, by reference to the appropriate sections of the Judicial Code, for concurrent jurisdiction in the court of claims and the district courts, sitting as a court of claims. *In the four instances above set forth it conferred jurisdiction only on the district courts.* In four instances it conferred jurisdiction only on the court of claims. The established rule of statutory construction should lead us to give effect in every practicable manner to the distinctions which Congress has seen fit to make. Compare *Penn. Mut. L. Ins. Co. v. Lederer*, 252 U. S. 523, 533, 64 L. Ed. 698, 702, 40 Sup. Ct. Rep. 397. And where it designates a jurisdiction in which the trial will be with a jury instead of one where the trial will be by the court alone, it is our duty to give effect to its designation.

"The Writ of Error is dismissed for want of jurisdiction in this Court."

To the same effect is *UNITED STATES v. NATIONAL CITY BANK OF NEW YORK,* Supra.

From the holding of the Pfitsch case the conclusion is absolute, that in suits, such as the instant case, brought under the War Risk Insurance Act, the District Court sits not as a Court of Claims under jurisdiction conferred by section 24, paragraph 20, of the Judicial Code, but in the exercise of its ordinary, usual and general jurisdiction. Such being the case, a jury trial was proper under section 566, Rev. Stat. (5 Stat.

at L. 726, 6 Fed. Stat. Anno. (2nd Ed.) 121, Comp. Stat. 1583), which provides in part as follows:

> "The trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury."

As stated above the cause was tried by the Court sitting without a jury without a written waiver of a jury trial. The question which next presents itself is as to the effect on writ of error of the lack of such written waiver of trial by jury. Clearly the instant case is one at law and does not fall within any of the exceptions of Section 566, above quoted.

The decisions of the United States Courts are so numerous upon this question and the same has been passed upon so often by this court that it is needless to more than call the court's attention to the matter.

At common law a trial at law without a jury was unknown. When a jury was waived the Court was not sitting as a judicial body but merely as an arbitrator and his determinations as such were not subject to judicial review. The only questions which could be reviewed by the appellate courts were questions of law arising on the face of the process, pleadings and judgment.

This rule of the common law was modified by Congress by Section 649, Rev. Stat. (13 Stat. at L. 501, 6 Fed. Stat. Anno. (2nd Ed.) 130, Comp. Stat. 1587) and Section 700 Rev. Stat. (13 Stat. at L. 501, 6 Fed. Stat. Anno. (2nd Ed.), 205, Comp. Stat. 1668), which

sections pertained exclusively to Circuit Courts. With the abolition of Circuit Courts, these sections were made applicable to disctrict courts, *LADD & TILTON BANK v. LOUIS A. HICKS CO.,* 218 Fed. 310 (C. C. A. 9th Cir.). Section 649 Rev. Stat. is as follows:

> "Issues of fact in civil cases in any Circuit Court may be tried and determined by the Court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the Clerk, a stipulation in writing waiving a jury. The finding of the Court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

Section 700, Rev. Stat. is as follows:

> "When an issue of fact in any civil cause in a Circuit Court is tried and determined by the Court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the Court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment."

It has been uniformly and consistently held by United States Courts that unless a jury trial is waived in the manner provided by Section 649, Rev. Stat., that the District Court trying a cause without a jury sits as an arbitrator and not as a judicial body and that appellate courts are limited in their reviews to questions of law arising upon the process, pleadings and judgment.

BOND v. DUSTIN, 112 U. S. 605, 28 L. Ed. 835, 5 Sup. Ct. Rep. 296;

CAMPBELL v. BOYREAU, 21 How. 223, 16 L. Ed. 96;
ROGERS v. UNITED STATES, 141 U. S. 548, 35 L. Ed. 853, 12 Sup. Ct. Rep. 91;
CAMPBELL v. UNITED STATES, 224 U. S. 99, 56 L. Ed. 684, 32 Sup. Ct. Rep. 398;
COMMISSIONERS OF ROAD IMPROVEMENT DISTRICT NO. 2 v. ST. LOUIS R. CO., 257 U. S. 547, 562, 66 L. Ed. 364, 42 Sup. Ct. Rep. 250;
RUSH v. NEWMAN, 58 Fed. 158, 160, 7 C. C. A. 136.

The same question has on numerous occasions been passed upon by this court.

DUNCAN v. ATCHISON, T. & S. F. R. CO., et al., 72 Fed. 808;
ERKEL v. UNITED STATES, 169 Fed. 623, 624, 95 C. C. A. 151, 152;
LADD AND TILTON BANK v. LOUIS A. HICKS CO., 218 Fed. 310.

The above cases all establish the rule of law to be that where no written waiver of a jury trial was made or filed as required by section 649 Rev. Stat. no question as to the admission or rejection of testimony or upon any other question of law growing out of the evidence can be considered by the appellate court. In order to merit consideration by the appellate court of questions allowed by Section 700, Rev. Stat., a strict compliance with the provisions of Section 649, Rev. Stat., is necessary.

The sufficiency of the finding of facts by the Court to support the judgment cannot be reviewed under such circumstances.

CAMPBELL v. UNITED STATES, 224 U. S. 99, 56 L. Ed. 684, 32 Sup. Ct. Rep. 398.

The fact that the United States is a party litigant does not in any manner effect this rule.

> *UNITED STATES v. NATIONAL CITY BANK OF NEW YORK*, 281 Fed. 754, (C. C. A. 2nd Cir.).

Except in cases where the statute of limitations or laches is involved in a suit of a purely governmental matter, when the United States appears as a suitor, it fundamentally submits to the law and places itself on the same footing as other litigants and is not entitled to remedies which cannot be granted to any individual.

> *SHOOTERS ISLAND SHIPYARD CO. v. STANDARD SHIP BUILDING CO.*, 293 Fed. 707 (C. C. A. 2nd Cir.).

The case of *UNITED STATES v. NATIONAL CITY BANK OF NEW YORK* is of particular interest here because of the fact that it arose under section 10 of the Lever Act; because the government contended that no jury trial was allowable; and because it deals with consequences resultant upon the failure of the United States as a party litigant to waive a jury trial in proper manner. The court there first determined that a trial by jury was proper, citing the case of *UNITED STATES v. PFITSCH*, Supra. The court then stated:

> "When a case is tried in a federal court without a jury, and without a written stipulation waiving a jury trial, certain important consequences follow. The statutes of the United States provide that the trial of issues of fact in the District Courts in all causes except in equity, and cases of admiralty and maritime jurisdiction, and except as otherwise pro-

vided in proceedings in bankruptcy, shall be by jury. Rev. Stat. Sec. 566 (Comp. St. Sec. 1583)."

> The court then set out sections 649 and 700 of Rev. Stat. and continued: "It appears from what has already been said that at the opening of the trial of this case, when counsel for the Bank stated that he would waive the right to a jury trial, the Court at once suggested: 'Then you will have to have a signed stipulation that this may be tried without a jury.'
>
> Counsel for the government did not seem to grasp the significance of the suggestion. At any rate, while he insisted that the matter should be tried without a jury, he claimed no waiver was necessary, and the case went to trial without a jury and without a written stipulation waiving the jury. The result is that no question is now open to review in this Court on the writ of error, except it be one arising upon the process, pleadings or judgment."

It is respectfully submitted by counsel for the defendant in error that the following conclusions are imperative: That this is action at law; that it is such an action as allows a trial by jury; that no written waiver of trial by jury was filed but on the contrary counsel for Plaintiff in Error insist that they moved for a trial without a jury; that since no written waiver was filed as required by law the District Court was sitting as an arbitrator and the only questions which can be presented to this court for review are questions of law arising upon the process, pleadings, and judgment; and that the United States as a litigant is subject to the same rules as other litigants when it allows itself generally to be sued.

Counsel for Defendant in Error further respectfully submit that no questions of law arise upon the process,

pleadings, or judgment in this case and that, therefore, there is nothing for the court to review.

Assuming, however, that the theory of the Plaintiff in Error is correct and that this cause was tried before the District Court sitting as a Court of Claims under the provisions of Section 24, par. 20 of the Judicial Code, still this court is entirely without jurisdiction. If the District Court was sitting as a court of claims as contended by Plaintiff in Error the remedy was by direct writ of error from the Supreme Court of the United States and not from the Circuit Court of Appeals.

J. HOMER FRITCH v. UNITED STATES, 248 U. S. 458, 63 L. Ed. 359, 39 Sup. Ct. Rep. 158.

ARGUMENT AND BRIEF ON THE MERITS.

Counsel for Plaintiff in Error have, for the sake of convenience, grouped their assignments of Error in seven groups, lettered from A to G inclusive. In so far as possible counsel for Defendant in Error will arrange their brief accordingly.

ASSIGNMENTS OF ERROR—GROUP "A."

Group "A" includes only assignment of Error No. 22 (Tr. p. 22).

(Brief of Plaintiff in Error p. 25.) The mere statement of the assignment of Error No. 22 shows that this not a proper finding of fact but nothing more or less than counsel's conclusion of what the law is applicable to the same.

Counsel cites cases to show that this is not an ordinary contract of insurance such as issued by insurance companies. There is no contention on the part of the Defendant in Error that the Contract of Insurance with the Government is like in all respects to the ordinary insurance contract. In many features it resembles the contracts of insurance of fraternal and mutual companies and in many features it does not. We do insist, however, that in so far as they are applicable the ordinary rules and principles of law governing other cases of insurance do govern War Risk Insurance.

UNITED STATES v. GURNEY, 4 Cranch 333, 2 L. Ed. 638;
UNITED STATES v. SMOOT (Smoot's case), 15 Wall. 36, 21 L. Ed. 107;
UNITED STATES v. SMITH, 94 U. S. 214, 24 L. Ed. 115;
UNITED STATES v. BARLOW, 184 U. S. 123, 137, 46 L. Ed. 463, 469, 22 Sup. Ct. Rep. 468;
ELLIOTT v. UNITED STATES, 271 Fed. 1001.

In the case of *ELLIOTT v. UNITED STATES,* Supra, Judge Westenhaver at great length made applicable to the contract of War Risk Insurance, certain rules and principles of law governing fraternal and mutual insurance.

ASSIGNMENTS OF ERROR—GROUP "B."

Group "B" (Brief of Plaintiff in Error, p. 32) contains assignments of Error 12, 20 and 21. In assignments of Error 20 and 21, counsel assign as error the fact that the Court found that the Director of the Vet-

erans' Bureau, in defining Total and Permanent Disability, acted in excess of authority and that such definition was repugnant to and in contravention of the meaning and intent of said Act. It is sufficient for counsel for Defendant in Error to point out to the Court that no such finding was made and that no such opinion was expressed by the Court below. (Tr. pp. 289 and 294.)

Although counsel for the Defendant in Error refuse to accept the position counsel for the Plaintiff in Error are trying to force upon them, namely, of sustaining a finding which was never made, to-wit: That the Director acted in excess of authority in defining total and permanent disability and that such definition is repugnant to and in contravention of the meaning and intent of the War Risk Insurance Act, nevertheless, we wish to point out that counsel for the Plaintiff in Error have, in their brief, proven beyond a doubt that the Director of the Bureau of War Risk Insurance has exceeded his authority and that his definition of total permanent disability is repugnant to and in contravention of the War Risk Insurance Act. The regulation defining total permanent disability is regulation No. 11, Treasury Decision 20 (brief of the Plaintiff in Error, page 31), and in so far as it does define total disability reads as follows:

> "Any impairment of mind or body which renders it *impossible for the disabled person to follow continuously any substantially gainful occupation* shall be deemed, in Articles III and IV, to be total disability."

Counsel for Plaintiff in Error, in their brief (pages 46 and 47), set forth at length the history of this Act in the United States Senate and show that as the bill passed the House, Section 302 (1), Article 3, read as follows:

> "If and while the disability is total *so as to make it impractical for the insured person to pursue any gainful occupation,* the monthly compensation shall be in the following amounts * * *."

Counsel in their brief then continue:

> "But these words underlined" (words which appear in italics) "were stricken out in the Senate (Cong. Rec. Part VIII, p. 7697."

Thus we see that the Director, in defining total disability, has done nothing more or less than rewrite into the statute the words which the Senate advisedly and deliberately struck out of the Act. The only difference is that the Director substituted the word "impossible" for the word "impractical" in order to make sure that the disabled man would get the worst of it, and added, evidently with the same purpose in mind, the word "continuously."

The words "permanent" and "total" have no hidden meaning, they are plain, ordinary English words; are not doubtful or ambiguous and need no definition of the Director or any Administrative Department of the Government. When ordinary English words are used in a statute they receive, at the hands of the court, their ordinary and usual meaning.

OSBORN v. THE BANK OF THE UNITED STATES, 9 Wheat. 739, 6 L. Ed. 204;

DANCIGER v. COOLEY, 248 U. S. 319, 63 L. Ed. 266, 39 Sup. Ct. Rep. 119;
MOORE v. UNITED STATES, 249 U. S. 487, 63 L. Ed. 721, 39 Sup. Ct. Rep. 322.

When words which are not doubtful or ambiguous are used in a statute, the Courts will not consider, to say nothing about following, the definition and interpretation of an administrative department of the Government.

SWIFT AND C. & B. CO. v. UNITED STATES, 105 U. S. 691, 26 L. Ed. 1108;
UNITED STATES v. GRAHAM, 110 U. S. 219, 28 L. Ed. 126, 3 Sup. Ct. Rep. 582;
ROBERTSON v. DOWNING, 127 U. S. 607, 32 L. Ed. 269, 8 Sup. Ct. Rep. 1328;
WEBSTER v. LUTHER, 163 U. S. 331, 41 L. Ed. 179, 16 Sup. Ct. Rep. 963.

Assignment of Error 12 is to the effect that the Court erred in failing to find that the determination of the Bureau was final and not an abuse of powers granted to said Bureau under the War Risk Insurance Act.

The very wording of Section 13 of the War Risk Insurance Act (40 Stat. 555, 9 Fed. Stat. Anno. (2nd Ed.), 1305, Comp. Stat. 514 kk), precludes such an idea. That section, after conferring the power upon the Director to make rules and regulations not inconsistent with the provisions of the Act concerning the administration of the Act and to prescribe methods of presenting proof to the Bureau and make rules and regulations not inconsistent with the Act, continues:

"Provided, however, That payment to any attorney or agent for such assistance as may be required in

> the preparation and execution of the necessary papers shall not exceed $3 in any one case: and provided further, That no claim agent or attorney shall be recognized in the presentation or adjudication of claims under Articles two, three and four, except that in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder, an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides."

Surely if the decision of the Bureau were to be final, the right to suit, as granted by the express words of the statute, would be useless and the decision of the Director of the Veterans' Bureau could then be reviewed only where there was a manifest abuse of discretion or where he acted contrary to law. In either of these cases it would not have been necessary for Congress to give consent to sue the United States as in either case one so aggrieved would have had the right to bring mandamus proceedings against the Director.

The very fact that Congress has consented to permit suit against the Government of the United States on War Risk Insurance cases in such language as entitles plaintiff to a trial by jury as pointed out in the case of *UNITED STATES v. PFITSCH*, 256 U. S. 547, 65 L. Ed. 1084, 41 Sup. Ct. Rep. 569, decided by Mr. Justice Brandeis and concurred in by the entire Supreme Court, negatives the idea that the decision of the Director is final. As Justice Brandeis points out, the jurisdiction conferred by this statute is the ordinary jurisdiction of the District Court and it could not be

that and be a court of Review as contended for by counsel for the Plaintiff in Error.

ASSIGNMENTS OF ERROR—GROUP "C."

These assignments of Error have all to do with the sufficiency of the evidence to sustain the findings of the Court below and being similar in nature to assignments in Group "E," will be considered hereafter in this brief under the heading of Group "E."

ASSIGNMENTS OF ERROR—GROUP "D."

This Group contains assignments of Error 6, 7, 8, and 11, all of which assign as error the fact that the Court below refused to limit the Defendant in Error to testimony of the condition of the Defendant in Error subsequent to his discharge from the Army and prior to August 31, 1919, the date on which it is alleged his last payment of insurance premiums were made, and are all assignments alleging as error the admission of testimony without stating the full substance of the evidence admitted.

It is questionable whether any of these assignments are, and certainly assignment of Error 11, is not stated in conformity with the rules of this Court. (Rule 24, Paragraph 2, Subdivision b).

However, it must be clear to the Court that in order to recover Defendant in Error not only had to show that he was totally and permanently disabled on the date of his discharge or the date his insurance premiums ceased to be paid, but also was totally and permanently disabled during the time for which he seeks

to recover. In other words, he has to show that he was totally and permanently disabled from the date of his discharge until the date the action was tried. In as much as the question of sufficiency of evidence is to a certain extent involved in the consideration of this group particularly with reference to whether or not there was sufficient evidence to show that Defendant in Error was totally and permanently disabled from the date of his discharge to August 31, 1919, what we have to say later in this brief under the heading of Group "E," will be applicable to this group also to that extent.

ASSIGNMENTS OF ERROR—GROUP "E."

We have heretofore deferred the consideration of assignments of Error, Group "C" and that part of assignments of Error, Group "D" which has to do with evidential matters and the same shall be considered under this head together with assignments of error which are grouped under this head by Plaintiff in Error. Therefore, our brief, under this head, shall be given to the consideration of assignments of Error 1, 2, 3, 4, 5, 6, 7, 8, 14, 15, 16, 23, 24, 25, 26 and 27, all of which assign as error in substance the fact that the Court, on the evidence introduced, found the plaintiff to be totally and permanently disabled during all the time elapsing from the date of his discharge to the date of the trial below and that the policy of insurance matured therefore on the date of his discharge from the United States Army.

The evidence submitted below can best be grouped,

for orderly consideration, into three heads, Documentary Evidence, Lay Evidence, and Medical Evidence.

DOCUMENTARY EVIDENCE.

The Documentary Evidence introduced in the Court below consists entirely of records taken from the official files kept by the Bureau of War Risk Insurance in the case of Defendant in Error and are in large part certified photostatic copies of the reports made by doctors of their examinations of the Defendant in Error under authority conferred upon them by the Bureau and of the ratings made by the different boards acting under direction of the Director of the Veterans' Bureau. The character of these exhibits as official documents is shown by the testimony of L. A. Lawlor, counsel for the Government, who tried the case below (Tr. pp. 174-182).

All of said exhibits, particularly all of the rating sheets in the file, show that the Bureau itself and the Director thereof, has considered the Defendant in Error as suffering from the date of his discharge to the date of the trial below from two disabilities, Tuberculosis and Neuro-psychosis. (Exhibits Tr. 74 to 270.) To illustrate our point and relieve the court of the necessity of reading all these exhibits we believe that our contention is clearly shown by Exhibits Numbered 7 and 14, found at pages 104 and 167, respectively, of the transcript. Exhibit No. 7 (Tr. p. 106), shows that on December 6, 1921, the Bureau rated him on both a Tubercular disability and a Neuro-psychiatric disability

in varying percents but gave him a combined rating on the two disabilities of total temporary disability extending from the date of his discharge to the date on which the rating was made. This rating was later revised and the final result of the Bureau's numerous ratings is shown by Exhibit No. 14 above referred to (Tr. p. 167), which is the last rating Defendant in Error received prior to the trial of this case and which rating was made subsequent to the filing of the action and on March 14, 1923, and which rating gives him, on all the evidence in the file, a temporary total rating from the date of his discharge to October 10, 1922, and from October 10, 1922, a rating of total permanent disability and specifically states that their rating is based upon "(psychosis maniac depressive and psychoneurosis) service connected."

Counsel for Defendant in Error are, as was the Court below, bewildered and unable to see how the Government can contest the point that Defendant in Error was totally and permanently disabled from the date of his discharge and see no way to more forcibly express themselves than the words used by the Court below. *McGovern v. United States*, 294 Fed. 108 (Tr. 289, 292). After stating his conclusions that the plaintiff below, here Defendant in Error, was totally and permanently disabled from the date of his discharge, the Court very aptly says:

> "This view is fortified by the Bureau's judgment. Despite its error of interpretation, practically from the beginning it has rated him of total disability; and as time passed, examinations repeated and con-

dition unimproved, it at least indicates that its earlier determination of temporariness was mistaken and must yield to the logic of events and to a judgment that his total disability is permanent. With this, the Court agrees."

That these exhibits have not only evidential value but are in fact binding on the Government as admissions, as well as admissable in evidence, is pointed out, under our consideration of assignments of Error "F" hereinafter set forth.

LAY EVIDENCE.

Counsel will not assume to comment at length upon the testimony set out in the transcript. A mere casual review of the evidence will convince the Court that this man has been in a serious condition ever since the date of his discharge, and prior thereto, and beyond doubt has been totally and permanently disabled during all of that time. However, counsel for the Defendant in Error believe that it would aid the Court to understand, what is not at first clear from the transcript, the manner in which the testimony was introduced.

Owing to the critical physical condition of the Defendant in Error, at the trial below, counsel had to abandon their intention of calling him as their first witness, he being seized with one of the spells which in the testimony is variously described as fits and fainting spells (Tr. p. 236), and owing to the fact that the only other witness, who knew the condition of the Defendant in Error from the date of his discharge to the date of the trial, was not in attendance at the time the trial began, counsel for the Defendant in Error were

compelled to introduce testimony concerning his condition for the last two or three years, and later to supply to the defect by connecting it up with the service through the testimony of the Defendant in Error by his deposition which appears Tr. pages 214 to 231, and the testimony of H. H. McGovern, Sr., Tr. 48 to 54. Owing to the fact that all the other witnesses called prior to the last two named had testified at great length and described in detail the fits or fainting spells from which Defendant in Error suffered, these witnesses were not called upon to describe in detail that condition but merely testified to the fact that this condition was prevalent ever since the date of his discharge. The fact that the testimony is given by one of the parties to the suit and by his father is no reason why the testimony should be at all discredited.

MEDICAL TESTIMONY.

The Medical Testimony to some extent is necessarily involved in the documentary testimony because most of the documentary evidence consisted of examinations and reports of the Government Doctors who have examined this man. However, the transcript shows that the doctors called by the Government had either never seen the Defendant in Error or had examined him upon but one or two occasions and but for a few minutes. Dr. Josewitch saw him on but two occasions (testimony of Dr. Josewitch, Tr. p. 257, testimony of H. H. McGovern, Jr., Tr. 220). Dr. Little examined him on but one occasion although he made two reports of his

condition (testimony of Dr. Little, Tr. p. 238-257, testimony of H. H. McGovern, Jr., Tr. 226). Dr. Price examined him but on one occasion (Tr. 232). Dr. Stiffler never saw the Defendant in Error (testimony of Dr. Stiffler, Tr. p. 263). Dr. Michaels was brought to the trial by the Government and appeared as their witness but was not put on the stand by the Government. But his diagnosis is fully set forth in Defendant in Error's Exhibit No. XII, introduced at the trial below (Tr. p. 150). Dr. Bentley was called on behalf of the Defendant in Error. His testimony is to be given a great deal of credit for the reason that it shows that he, above all other Government doctors, has been familiar with his case, having seen him every day, and five and six times every day, for a period of five or six months, and for the further reason that he testified that he made a particular study of the Defendant in Error's case and for the additional reason that he is one of the doctors in the employ of the Government. His testimony is clear and to the effect that the Defendant in Error is and has been totally and permanently disabled.

ASSIGNMENTS OF ERROR—GROUP "F."

To this Group counsel for Plaintiff in Error have grouped assignments of Error 9 and 10 and have restated assignment of Error No. 11, which they also grouped in group "D." We have heretofore in this brief remarked that that assignment is not drawn in accordance with the rules of this Court, Rule 24, Par.

2, (b), and likewise commented in our brief in regard to group "D" upon the propriety of admitting the testimony objected to by the Plaintiff in Error in its assignment of Error No. 11. Assignment of Error 9 assigns as error the admission in evidence of the exhibits offered on behalf of the plaintiff for any other purpose than to show a disagreement between the Government and the Claimant. These exhibits were in fact all admissions made by the Bureau under authority granted to the Director thereof by the War Risk Insurance Act which said Bureau is empowered to examine, report, rate and make determinations on such examinations and reports and are all therefore public official documents and judgments of a special tribunal and are therefore competent evidence wherever material.

EVANSTON v. GUNN, 99 U. S. 660, 25 L. Ed. 306.

Counsel for Plaintiff in Error assign as error in its assignment No. 10 the fact that the Court erred in admitting testimony which had not previously been submitted to the Bureau. We submit that even though that were true, nevertheless, there is sufficient evidence shown to have been submitted to the Bureau to sustain the findings of the Court, namely, the exhibits offered on behalf of the Defendant in Error.

Plaintiff in Error prefaces its argument on this proposition with the statement that it is necessary to show a disagreement between the Bureau and the Claimant. With this we heartily agree and wish to

point out to the Court that Plaintiff in Error, in the answer which it filed in this action, has admitted the existence of a disagreement between the claimant (Defendant in Error) and the Bureau. (Tr. p. 9.)

This assignment of Error is predicated on the Government's false idea of the nature of the jurisdiction of the lower court. They deem it to be a court of review passing on the acts of the Bureau. The very wording of the statute itself precludes such an idea. Section 13 of the War Risk Insurance Act (40 Stat. 555, Comp. Stat. 514 kk) which confers jurisdiction to hear such cases upon the District Court of the United States, is set out in full on pages 74 and 75 of the brief of the Plaintiff in Error and the reading of that section as a whole shows conclusively that the idea of Congress was not to make the determination of the Director a final judicial determination. The sole thought actuating Congress was to prevent lawyers, attorneys, and agents from representing claimants before the Bureau and was to have the whole proposition, as far as its determination before the Bureau was concerned, tried as laymen would try it, reserving, however, a final, judicial, ultimate determination before a real court of law, deciding the whole question whenever the claimant and the Director could not agree. The very wording of this statute precludes the idea of the District Court being a court of appeals and being limited in its consideration to evidence previously submitted to the Bureau, because the jurisdiction conferred upon the District Court, by the words used in Section 13, is

the ordinary general jurisdiction of the District Court as is very forcefully pointed out by Mr. Justice Brandeis in the case heretofore cited by us. *UNITED STATES v. PFITSCH,* 256 U. S. 547, 65 L. Ed. 1084, 41 Sup. Ct. Rep. 569.

ASSIGNMENTS OF ERROR—GROUP "G."

Each assignment of Error in this Group has heretofore been considered in this brief as they are simply stating in another way, assignments of Error previously grouped and previously considered.

CONCLUSIONS.

It is respectfully submitted by counsel for Defendant in Error that:

(1) Since this cause was tried to the Court below under its ordinary, usual and general jurisdiction and without a jury, and since no written waiver of trial was made or filed as required by statute and since there are no questions of law arising upon the process, pleadings and judgment, there is nothing for this court to review;

(2) Even assuming that the contention of counsel for Plaintiff in Error is correct that this cause was tried by the Court below under the jurisdiction conferred by section 24, par. 20, of the Judicial Code (Tucker Act), still there is nothing to review in this Court as the remedy of the Plaintiff in Error was by direct writ of error from the Supreme Court of the United States;

(3) That regardless of the nature of the Writ taken or whence taken, no error appears in the record.

Respectfully submitted.

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